

**Baker Manufacturing Company and United Steelworkers of America, AFL-CIO and Gary S. Thornton. Cases 23-CA-8532 and 23-CA-8602**

30 March 1984

**DECISION AND ORDER**

**BY CHAIRMAN DOTSON AND MEMBERS  
ZIMMERMAN AND HUNTER**

On 17 September 1982 Administrative Law Judge Richard J. Linton issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed limited exceptions and a brief in support and otherwise in support of the decision of the judge, and the Respondent filed an answering brief to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order as modified.<sup>2</sup>

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Additionally, the Respondent asserts that the judge's findings are a result of bias. After a careful examination of the entire record, we are satisfied that this allegation is without merit.

In sec. III,D,3,(e),4 of his decision, the judge referred to the Respondent's "unconditional" offer to reinstate employee Appleton, but it is clear from the context that he intended to refer to the offer as conditional.

<sup>2</sup> The judge declined to leave to the compliance stage of this proceeding the issue of the validity of the Respondent's offer of reinstatement to employee Thornton. In so doing, he noted, *inter alia*, that the complaint alleged that the Respondent had refused to reinstate Thornton and that the Respondent had submitted into evidence its letter of recall sent to Thornton. Although making no determination as to whether the recall letter in fact constituted a valid offer of reinstatement, the judge concluded that the General Counsel had the burden to litigate the issue or, at least, to show that the matter could not be fully litigated at the hearing and that it would need to be resolved at the compliance stage. Finding that the General Counsel had failed to meet this burden, the judge concluded that an order requiring the Respondent to offer Thornton reinstatement was inappropriate. The General counsel has excepted to the judge's conclusions. Since the record was not fully developed on the issue of whether the Respondent made a valid offer of reinstatement to Thornton, we shall order the Respondent to offer reinstatement to Thornton and shall leave the matter to the compliance stage of this proceeding. See *Panscape Corp.*, 231 NLRB 693 (1977).

Additionally, contrary to the judge, we shall leave to the compliance stage of this proceeding the issues concerning the validity of the offers of reinstatement to employees Appleton and Wright, including their failure to respond to the offers. We conclude that, as in Thornton's case, these matters were not fully litigated. Thus, we note with respect to Wright that the record contains different descriptions of Wright's classification at the time of his layoff and indicates that Wright had the capability to operate a variety of machines. Furthermore, although the judge referred to Appleton's and Wright's testimony that they did not respond to the recall letters because they had other jobs, he pointed out that the record was

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Baker Manufacturing Company, Ingleside, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Add the following name to the list of employees named in paragraph 2(a).

"Gary S. Thornton."

2. Substitute the following for paragraph 2(f).

"(f) Expunge from its files any references to the discharge of Timothy Jolly, the terminations of Jesus A. Canales and Connie Lane, and the layoffs of Kenneth Appleton, Edward Brown, Roger Strahm, Gary S. Thornton, and Gene E. Wright Jr. and notify them in writing that this has been done and that the evidence of the unlawful discharge, terminations, and layoffs will not be used as a basis for further personnel action against them."

3. Substitute the attached notice for that of the administrative law judge.

not further developed on this issue with respect to Appleton, and the record was not further developed concerning Wright.

We shall modify the Order to provide an expunction remedy for the unlawful terminations of Jesus A. Canales and Connie Lane and for the unlawful layoffs of Kenneth Appleton, Edward Brown, Roger Strahm, Gary S. Thornton, and Gene E. Wright Jr.

**APPENDIX**

**NOTICE TO EMPLOYEES**

**POSTED BY ORDER OF THE**

**NATIONAL LABOR RELATIONS BOARD**

**An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

Accordingly, we give you these assurances:

**WE WILL NOT** surveil you by unlawfully photographing those of you who are wearing union badges.

WE WILL NOT impliedly threaten you with unspecified future reprisals if you do not cease supporting a union organizing movement.

WE WILL NOT discourage you from joining or supporting United Steelworkers of America, AFL-CIO; International Union of Electrical, Radio and Machine Workers, AFL-CIO, or any other labor organization by unlawfully discharging you, terminating you, or laying you off or by discriminating against you in any other manner with respect to your hire or tenure of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer the below-named employees immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed:

Kenneth Appleton	Roger Strahm
Jesus A. Canales	Gary S. Thornton
Timothy Jolly	Gene E. Wright Jr.
Connie Lane	

WE WILL reestablish the positions of toolroom attendant and maintenance electrician if Connie Lane and Jesus A. Canales accept the offers of reinstatement to their old jobs.

WE WILL make whole the below-named employees for any loss of earnings, with interest, that they may have suffered as a result of our discriminatorily discharging them, terminating them, or laying them off, and WE WILL reimburse, with interest, Jesus A. Canales for any educational expenses he has incurred in taking electrical courses if it is determined in the compliance stage that he would have paid for any or all of such expenses:

Kenneth Appleton	Connie Lane
Edward Brown	Roger Strahm
Jesus A. Canales	Gary S. Thornton
Timothy Jolly	Gene E. Wright Jr.

WE WILL expunge from our files any reference to the discharge of Timothy Jolly, the terminations of Jesus A. Canales and Connie Lane, and the layoffs of Kenneth Appleton, Edward Brown, Roger Strahm, Gary S. Thornton, and Gene E. Wright Jr., and WE WILL notify them in writing that this has been done and that the evidence of our unlawful discharge, terminations, and layoffs of them will not be used as a basis for further personnel action against them.

#### BAKERY MANUFACTURING COMPANY

## DECISION

### STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. This case was tried before me in Corpus Christi, Texas, on April 13, 14, and 20, 1982, pursuant to the August 20, 1981 consolidated complaint issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 23 of the Board. The consolidated complaint (complaint herein) is based on a charge, subsequently amended, filed June 12, 1981, by United Steelworkers of America, AFL-CIO (Union or Steelworkers) in Case 23-CA-8532 against Baker Manufacturing Company (the Respondent or Baker), and also on a charge filed June 29, 1981 by Gary S. Thornton (Thornton), an individual, against Baker in Case 23-CA-8602.<sup>1</sup>

In the complaint, the General Counsel alleged that the Respondent violated Section 8(a)(1) of the Act by various statements and other conduct, including photographic surveillance, and Section 8(a)(3) of the Act by discharging or laying off eight employees, including Thornton, because of their union or other concerted activities.

Admitting certain factual allegations, but denying that it had violated the Act, the Respondent defends against the principal allegations on the basis that the one discharge was for cause and other terminations and layoffs were because of economic considerations.

Based on the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel,<sup>2</sup> and the Respondent, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

A Texas corporation with its principal office and place of business at Ingleside (near Corpus Christi), Texas, the Respondent manufactures gear boxes and cranes. During the past 12 months, the Respondent purchased materials, valued in excess of \$50,000, that were shipped to the Respondent's Ingleside facility directly from points outside the State of Texas. The Respondent admits, and I find, that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. LABOR ORGANIZATIONS INVOLVED

The Respondent admits, and I find, that United Steelworkers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

I also find that International Union of Electrical, Radio and Machine Workers, AFL-CIO (IUE), is a labor organization within the meaning of Section 2(5) of the Act. Moreover, the IUE has been found to be such in other Board cases. See, for example, *East Dayton Tool & Die Co.*, 239 NLRB 141 (1978), and *Westinghouse Electric Corp.*, 239 NLRB 106 (1978).

<sup>1</sup> All dates are for 1981 unless otherwise indicated.

<sup>2</sup> By letter timely filed, the Union advised that it adopts the arguments advanced by the General Counsel.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. Nature of the Respondent's Business-Corporate Relationship

The Respondent is a subsidiary of Baker Marine Corporation (Baker Marine). The latter operates facilities at Ingleside and Cabiness Field, both of which are near Corpus Christi, Texas. Ingleside is the assembly yard, or shipyard, where Baker Marine erects its offshore oil rigs. At the Cabiness Field facility,<sup>3</sup> Baker Marine fabricates and torch cuts components for its offshore rigs and then sends the components to the Respondent for machining, assembling, and testing. In effect, the Respondent functions as Baker Marine's machine shop and component assembly department or subcontractor.<sup>4</sup> Indeed, Baker Marine is the Respondent's primary customer and source of work. The Respondent is itself divided into two departments, one being the machine shop and the other being the assembly department. In January, its total complement of some 58 to 60 production employees were about evenly divided between the two departments.

The Respondent machines such items as pinions of different sizes, elevating gear cases, and bull gears, and assembles cranes and other items into finished products used by Baker Marine in the assembly of its offshore oil drilling rigs. The Respondent also tests the assembled components before they are transported to Baker Marine's rig assembly yard.

The employees of Baker Marine are represented by the Steelworkers, whereas the Respondent's employees are unrepresented. In January, Baker Marine employed approximately 550 production employees. It is undisputed that the seniority of employees of any of the affiliated Baker companies is portable if an employee transfers from one such firm to another. On the other hand, it appears that such employee completes an employment application at the new company and serves a probationary term there.

Temple Williams is the general manager of the Respondent. He testified that he has total responsibility for the operation of the Respondent. (Tr. 209.) Nevertheless, he also testified that he normally reports to several people at Baker Marine, including President Larry Baker Jr., Executive Vice President John Haley,<sup>5</sup> and Bill Gear, vice president of the Respondent. Before Williams came to the Respondent on January 9, 1979, he served at Baker Marine as the assistant to the president. Williams testified that the Respondent was formed when Baker Marine purchased C.C. Fab and Machine Shop, the Respondent's predecessor (Tr. 267). The former owner of C.C. Fab and Machine Shop remained as the Respondent's general manager. Williams succeeded him.

<sup>3</sup> Cabiness Field is an old airfield of the U.S. Navy where Baker Marine utilizes two hangers.

<sup>4</sup> Reference to subcontractor or department is made here for descriptive purposes, and no finding is made here regarding any alter ego or single employer concepts. The corporate relationship, however, does have a material bearing on assertions that the Respondent had knowledge of the union activities of its machine shop employees. That issue is discussed below.

<sup>5</sup> The spelling shown is that which appears on certain exhibits (recall letters) and in the Respondent's brief.

As the record reflects, many of the industrial and personnel forms utilized by the Respondent are forms used by Baker Marine and bear the latter's name. Williams testified that the Respondent has a large supply of such forms. As they are exhausted, he replaces them with forms reflecting the Respondent's name (Tr. 266).

#### B. Early Events

##### 1. Union activity initiated—lockout at Baker Marine

As described by machinist Tim Jolly, employee grievances in the Respondent's machine shop had been festering for many months before employees held their initial meeting with IUE International Representative Ray Mendez on February 11. The grievances covered the sufficiency of pay and bonuses, long hours, lack of communication with management via shop meetings formerly conducted once a month, and a perceived inability to discuss problems with Williams without the latter "jumping" all over the employee attempting to talk to Williams.

Machine shop employees Jolly, Gary S. Thornton, the Charging Party herein, and Connie Lane, aware that maintenance electrician Jesus A. Canales had transferred from Baker Marine, and that he had been a member there of the Steelworkers, approached Canales about mid-January seeking his help in organizing into a union.<sup>6</sup> Canales contacted Mendez, whom he knew, and arrangements were made for Mendez to meet with the interested employees.<sup>7</sup> That meeting apparently had to be rescheduled, and the first of several formal meetings was held at Thornton's home the evening of February 11.

Mendez testified that he met there with Canales, Thornton, Jolly, Lane, Herman Arrendondo, and Roger Strackbein. Mendez discussed the possibility of the IUE organizing the employees, but he advised them that he could not give them any authorization cards until he checked with his own superiors concerning the matter of whether the Steelworkers would have jurisdiction. Mendez met again with the employee group (the numbers and identities varied slightly) at Thornton's home on February 24, and met again about March 3 at Lane's home when some employees of the first and second shifts also attended. At this third meeting on March 3, Mendez informed the group that because of its collective-bargaining agreement, the Steelworkers had jurisdiction over anything affiliated with Baker Marine in the Ingleside area (Tr. 50). On March 4, Mendez and Canales conferred with Manuel Narvaez, the Steelworkers' representative. The organizing meetings held thereafter apparently were with the Steelworkers.

In the meantime, Baker Marine, engaged in contract renewal negotiations with the Union, locked out its 560 production workers from the end of the day on January 30 until 7 a.m. March 16. Presumably the Union and

<sup>6</sup> Although the informal of Canales' given name is spelled "Jessie" in the transcript, I note that it appears as "Jesse" on the attendance calendars the Respondent used for Canales (G.C. Exh. 4). I therefore adopt the latter spelling whenever his given name is used herein.

<sup>7</sup> Canales testified that the employees did not want to contact the Steelworkers because they wanted to be independent (Tr. 66).

Baker Marine agreed upon a renewal contract around the end of the lockout.

The relevance the lockout has to this case lies in the issue of whether, or the extent to which, the lockout had an adverse impact on the Respondent's business. The Respondent contends that the impact was severe enough to create the need to lay off employees, whereas the General Counsel argues, in effect, that there was no adverse impact and that the Respondent merely seized upon the occasions of the lockout as a convenient, but artificial, pretext to terminate the union supporters.

Glenn R. Graham, personnel manager for Baker Marine, testified that only 379 employees returned to work at the end of the lockout, and that it took Baker Marine to mid-August to return to the employee level it had before the lockout (Tr. 230). During the lockout, Baker Marine operated, to whatever extent it could, with 50 supervisors or about 10 percent of its work force (Tr. 238, Graham). As we shall see below, Williams testified that the lockout shut down about 90 percent of the work the Respondent could do.

## 2. Secretary reports names—Williams learns

Debra Karstedt served as Temple Williams' secretary from January 1980 to February 13, 1981. She testified without contradiction that she handled all the office work, including personnel files, purchase orders, shipping and receiving records, filing, telephoning, and anything Williams needed (Tr. 166). Williams, she testified, was her friend, but so were some other employees.

Williams was in a local hospital from Monday, February 9, to the early afternoon of Friday, February 13. On the evening of February 12, Jolly, Lane, and Herman Arrendondo visited Karstedt at the latter's home for the expressed purpose of requesting a list of names of the Respondent's employees in order to advance their organizing effort. They identified the others involved with them as being Thornton, Canales, Kenneth Appleton, Roger Strahm, Gene Wright Jr., Edward Brown, Clay Kuykendall, Pat Rhea, and Mike Lewey.

Karstedt apparently did not cooperate. She testified that the group's activity made her feel that they were "trying to get (Williams) when he was down and I didn't like it."<sup>8</sup> (Tr. 168.) The following day, Friday, February 13 Karstedt telephoned the secretary for Baker Marine's Executive Vice President John Haley and arranged to meet with Haley that day without any advance notice of the purpose of her visit.<sup>9</sup>

Although she felt "a little guilty for going against my friends," Karstedt informed Haley that an employee group was beginning to organize, named the employees listed above, and explained that she had come to him because she did not want to upset Williams. She recalled that he wrote down the names as she spoke to him. He did not mention Williams. Learning that she had not told anyone else of this, Haley requested that she not discuss

it with anyone (Tr. 170). There is no dispute that later that day Williams, after leaving the hospital, stopped by his office for a brief period of about 30 minutes. That Friday was Karstedt's last workday before she left on a vacation to Colorado. After receiving an extension on her vacation, Karstedt terminated her employment with the Respondent in order to remain in Colorado, but moved back to Corpus Christi in October.

Machinist Roger Strahm testified that on February 27 he conversed with Williams at the former's work stations.<sup>10</sup> Strahm had requested Machinist Foreman Tom Landes to ask Williams to come by. Strahm told Williams that there seemed to be a lack of communication, that he had been a member of unions in the north, and suggested that Williams arrange a meeting with Larry Baker Jr. or Larry Baker Sr. (and the employees), to resolve the communication problem. Williams expressed a doubt that such a meeting could be held but that he would try to arrange it.

At that point Williams told Strahm that he had received a telephone call while he was in the hospital in which the caller (unnamed in the record) had informed him that the employees were organizing a union (Tr. 129). Strahm said that Williams had learned about it before Strahm did. They conversed for a brief period longer on the topic of seniority in which Williams, although asserting that seniority did mean something, was unable to give a meaningful answer concerning any practical effect of the seniority concept.

Williams did not address the foregoing conversation in his own testimony, although he did state that he first "suspected" union activity when he observed some employees wearing the homemade union badges the week of February 23 thru 27 (Tr. 33).

Strahm testified in a straightforward and credible manner. In contrast, Williams did not. For example, Williams sought to hedge on whether the union badges constituted evidence of union activity, finally conceding that he at least *suspected* union activity at that point. I find Williams to be a generally unbelievable witness.

Without making a finding of alter ego or single employer, it is clear that there is an agency relationship between Williams and his superiors at Baker Marine.<sup>11</sup> Accordingly, I find that Karstedt's report to Haley was, as a matter of law, a report of the Respondent. I further find that the telephonic report of union organizing which Williams received while in the hospital was in fact Haley reporting to Williams the news and names he had received from Karstedt. In short, I find that on Friday, February 13, Williams received actual knowledge of the names of his employees who were spearheading a union

<sup>10</sup> Strahm pegged the date as being 2 days after the organizing group began wearing homemade union badges. As will be discussed, that date was Wednesday, February 25.

<sup>11</sup> The record contains many examples of this relationship. Some are mentioned below in other contexts, such as Williams' testimony that Baker Marine instructed him to lay off employees, if necessary, to help Baker Marine's cash flow problem during the lockout. When the union badges appeared, Williams testified that he reported the development to Larry Baker Jr. and asked for advice on how to handle the situation (Tr. 331). When recall letters were mailed to laid-off employees, blind copies were sent to Haley, among others.

<sup>8</sup> Karstedt's irritation appears to have been directed toward the conjunction of the union activity and/or requests with Williams' hospitalization rather than reflecting any animus for the union activity as such.

<sup>9</sup> Karstedt considered Haley to be Williams' immediate superior, and testified that Haley had visited the Respondent's office on occasion (Tr. 177).

organizing drive. In significant ways, the meeting Williams held with the machine shop employees on Monday, February 16, reinforces the foregoing findings.

Complaint paragraph 9(c) alleges that the Respondent, through Williams, violated Section 8(a)(1) of the Act by telling (date unalleged) an employee that he had learned "the weekend of February 21, 1981, that employees were engaged in union activities." In its brief, the Respondent contends that the allegation should be dismissed because there is "no evidence" that Williams made any such statement about the weekend of February 21. I take this to be an argument of variance. The General Counsel argues that the allegation is supported by the February 27 conversation between Strahm and Williams and that Williams' remark about the report made to him in the hospital constitutes illegal surveillance.

While I shall dismiss the allegation, I do so not because of the minor (and unobjected to) variance in dates between the pleading and evidence, but because the statement made by Williams, while revealing the occasion of his knowledge, did not suggest surveillance nor tend to create the impression of same and was therefore not unlawful.

### 3. Williams meets with employees

On Monday, February 16, Williams conducted a meeting in his office with the day-shift machinists, 18 or more in number. There is a night shift. It is unclear how many machinists work on the night shift, but that he tried to hold such a meeting every 6 months (Tr. 340), it is clear that this meeting was not some semiannual general discussion meeting. Williams was angry. As drill press operator Edward Brown testified, Williams, usually easy going, "was mad about something." (Tr. 102)

From the testimony of Brown, machinists Kenneth Appleton, Roger Strahm, Charging Party Thornton, Gene Wright Jr., and tool room attendant Connie Lane, I find that Williams began by telling the group of 18 or 20 employees that he had heard some of them were unhappy and felt that they were being mistreated. He told them he was Baker Manufacturing Company, that he had authorization from the Bakers to run the shop as he saw fit, and that if any employees did not like it there the door was big enough for all of them to go through. He also spoke of the operation of the machines of the work schedule ahead of them, and stated that there was plenty of work notwithstanding the lockout at Baker Marine.<sup>12</sup>

Williams then opened the meeting for any questions. Although one or two employees spoke up about the long hours (averaging around 55 to 58 hours a week), and possibly another topic or two,<sup>13</sup> most said nothing. In the words of machinist Brown on cross-examination, "I would have been really afraid to bring up anything up . . . it wasn't . . . a good atmosphere to bring up a ques-

<sup>12</sup> Although only Appleton quoted Williams as referring to the work schedule and the supply of the available work, I credit him. Edward Brown credibly testified that Williams said nothing about an impending layoff (Tr. 98).

<sup>13</sup> Lane gave vague testimony that machinists Dan Fraley asked something about the Union (Tr. 214). I note that she could not recall Williams' response. No witness corroborates Lane. Lane did not testify on this point in a believable fashion, and I do not credit her as to this.

tion." (Tr. 102.) As Kenneth Appleton expressed it, although Williams said the employees would speak freely, "it was kind of hard to feel free to talk." (Tr. 115.)

Williams did not offer a description of the meeting in his testimony, and he briefly referred to it only twice at trial (Tr. 35, 340). There is no evidence that Williams thereafter met with the assembly employees who constituted the other half of his employee complement.<sup>14</sup> I credit the employees in the description they gave of the meeting.

I conclude that the reason Williams held the meeting was to vent his anger over the report that machine shop employees were trying to organize a union. While Williams was circumspect enough that he did not expressly refer to the union effort, it is clear, and I find, that his reference to employee dissatisfaction was a veiled reference to the fact the employees were organizing. This is particularly true when viewed in light of the telephonic report he had received only 3 days earlier, and in light of his angry remark that unhappy employees could leave (quit).<sup>15</sup> Finally, I conclude that an additional reason Williams had in conducting the meeting was to chill the nascent organizing activity.<sup>16</sup>

### C. Alleged Interference, Restraint, and Coercion

#### 1. Appearance of the union badges

There is no dispute that on Wednesday, February 25, a group of the Respondent's machine shop employees donned homemade badges bearing the following legend (G.C. Exh. 17):

YES  
UNION

The letters, one-half inch in height, apparently were printed with a felt tip pen. The group began wearing them for protection, at the suggestion of IUE Representative Mendez, following the February 18 termination of Connie Lane and the February 19 discharge of Timothy Jolly, two of the main leaders of the organizing effort. Most of the group wore the badges at all times thereafter at work. Canales testified that there were "10 or 12" who wore the badges (Tr. 69). It appears that the group consisted of the approximately one dozen names Karstedt gave to Haley.

#### 2. Federico Pena not a supervisor

The supervisory status of Federico Pena is in dispute. In paragraph 7 of the complaint, the General Counsel al-

<sup>14</sup> For that matter, the record does not reflect whether Williams subsequently addressed the machinists on the night shift. It is clear that the union activity originated with the day-shift machinists. It further seems that the dozen or so who wore union badges were all day-shift machinists.

<sup>15</sup> In the circumstances such as we have here, the Board has held such remarks to employees to be violative of Sec. 8(a)(1) of the Act as being threats of discharge should employees persist in their protected activities. *Steinerfilm, Inc.*, 255 NLRB 769 (1981), *enfd.* in pertinent part 669 F.2d 845 (1st Cir. 1982); *Herbst Supply Co.*, 222 NLRB 448 (1976).

<sup>16</sup> The General Counsel does not allege that the Respondent violated Sec. 8(a)(1) of the Act regarding this meeting.

leges that the Respondent violated Section 8(a)(1) of the Act about February 25 when Pena categorized an employee's union badges as a "son-of-a-bitch" button, ordered the employee to remove the button if he wanted to remain on the job, and physically attempted to remove the button from the employee's shirt.

Former maintenance electrician Jesse A. Canales was one of the employees who came to work on February 25 wearing homemade union badges. Despite the trial denials of Pena (Tr. 436), I credit Canales, who testified in a more straightforward and believable manner, that on February 25 Pena did so refer to the badge Canales was wearing and told him to remove it. When Canales refused, Pena physically attempted to rip the badge from Canales' shirt. Pena was unsuccessful because Canales dodged (Tr. 73).

I find that Pena is not a statutory supervisor. Pena is salaried, and one welder, Victor Gutierrez, was hired after Pena so recommended. However, Gutierrez apparently went through the usual interview process with Williams or Jim Stewart before he was hired (Tr. 441, Pena).<sup>17</sup> There is nothing to show what weight Williams or Stewart gave to Pena's recommendation.

Pena works as a welder. He has always had at least one welder, and sometimes two, working with him. He reports the time the other welder works on different projects, but if the other welder desires time off, he must secure permission from Williams or Stewart. Pena does not attend formal supervisors' meetings although he does confer with acknowledged supervisors about welding matters. It is clear that Pena lends his expertise in helping other welders, but the record evidence falls short of establishing that Pena, with independent judgment, responsibly directs the other welders in their work. It appears that Pena functions as a nonsupervisory leadman or nonsupervisory working foreman. Accordingly, I shall dismiss the complaint paragraph 7.

### 3. The mystery photographer

Complaint paragraph 8 alleges that the Respondent violated Section 8(a)(1) of the Act when, about February 26, it "surveilled its employees' union activities by taking photographs of employees who were wearing union buttons." The Respondent denies that allegation.

Without contradiction, Canales testified that around February 23 or 24, a photographer he had never seen before came into the shop and, for 30 to 45 minutes between 10 and 11 a.m., appeared to take photographs only of those employees wearing union badges.<sup>18</sup> Using a 35mm camera, the photographer would stand on one side of the building and point his camera across the building and at the employees wearing badges. Canales testified that in the past Williams or someone else would accom-

pany the photographer, whereas the photographer here was unaccompanied. There is no direct evidence that Williams or any other supervisor observed the photographer or was aware of his presence. Although Williams denied knowledge of any such photographer (Tr. 268), I do not credit his denial and I find that he did know in advance that the photographer would be present.

Bob Redding, advertising manager for Baker Marine, testified that Baker Marine occasionally photographs its products for inclusion of the photographs in sales brochures, that he had custody and control of the photograph file, that he had inspected that file, and that the file does not contain any photographs of employees wearing union badges.

I credit both Canales and Redding. The appearance of the mystery photographer so soon after employees began wearing union badges raises the possibility that the Respondent arranged the event to intimidate the union supporters, and, in view of Williams' advance knowledge, I infer such a plan. This finding is buttressed by the fact that no such photographs are contained in Baker Marine's file. Thus, the Respondent, I find, utilized an independent photographer to take the photographs. I shall order that the Respondent not repeat such activity.

## 4. Temple Williams

### a. Introduction

Complaint paragraph 9 contains four allegations that the Respondent violated Section 8(a)(1) of the Act through the conduct of General Manager Temple Williams. Earlier I discussed the testimony of Roger Strahm that on February 27, Williams, at Strahm's request, came to the latter's work station. In the ensuing conversation, Williams related that while he was in the hospital he received a telephonic notice that employees were organizing a union. I concluded that paragraph 9(c), based on such conversation, should be dismissed.

Paragraphs 9(a) and (b) are based on a February 27 conversation with machinists Kenneth Appleton, and paragraph 9(d) is based on a March 6 conversation with machinist Gary Thornton.

### b. Williams converses with Appleton

Boring mill operator Kenneth Appleton testified that about February 27 or 28, following the end of his work shift, he had a conversation with Williams in which Appleton said that the employees were dissatisfied with working conditions becoming stricter and stricter. He expressed a doubt whether his wearing of the union badge was the correct decision. Williams remarked that he was aware that employees had been holding meetings at Tim Jolly's home (Tr. 112). Appleton replied that a bunch of them had gone over that and had drunk beer, but that he knew nothing of any meetings there. Williams did not cover the conversation in his testimony.

It appears that no union meetings were held at Jolly's home until sometime in March. On the other hand, Jolly testified that months before the IUE was contacted, he and several employees met, apparently at his home, and discussed problems at work. (Tr. 187.)

<sup>17</sup> "Jim Stewart" is not fully identified in the record. Williams testified that Roger Smith was the assembly foreman or superintendent over the welding area during the relevant times (Tr. 30, 271). Pena testified that he reports to Stewart each morning to ascertain what work needs to be done (Tr. 436).

<sup>18</sup> As Canales and the union advocates began wearing their homemade union badges on Wednesday, February 25, and Canales was fired early on Saturday, February 28, it is clear that this photography event had to occur during the 3 days of February 25 through 27.

I shall dismiss paragraphs 9(a) and (b). The former alleges that Williams asked an employee about the job complaints. Appleton concedes that he is the one who mentioned the subject of employee dissatisfaction (Tr. 113), and there is no evidence that Williams asked any questions on the subject.

Paragraph 9(b) alleges that Williams asserted that he had information that the Union was conducting meetings at Jolly's home. There is no such evidence in the record, and Appleton's testimony appears to describe a reference by Williams to employee gatherings at Jolly's home in 1980.

*c. Williams converses with Thornton*

Complaint paragraph 9(d) alleges that on some unspecified occasion, Williams told an employee that if he "repented his sins" for "supporting the Union," the employee would have peace of mind.

Boring mill operator Gary S. Thornton, the Charging Party herein, testified that about Friday, March 6, Williams approached him at his work station and engaged Thornton in a general conversation. Thornton was wearing his union badge. During the undescribed conversation, Thornton testified that Williams said "that if I repented my sins I'd have peace of mind." (Tr. 141) Nothing, apparently, was said expressly about union activities. Indeed, Thornton admitted that Williams did not explain what "sins" he was referring to (Tr. 145), and testified that he never had any conversation with a supervisor about the union or his union activities. (Tr. 140, 148).<sup>19</sup> At trial, Williams was not asked about the conversation.

Based on Thornton's credited testimony, I find that Williams obliquely referred to Thornton's union activities as "sins." The remark appears to have been unassociated with any topic of the general discussion Williams and Thornton had, and there is no evidence that it related to any preexisting subject. I further find that by Williams' reference to repentance and sins, in conjunction with the reference to peace of mind in the future, Williams made a veiled threat to Thornton that he could avoid unspecified reprisals (i.e., have peace of mind) if he ceased supporting a union (i.e., repented his sins). Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act by Williams' implied threat of future reprisals.

*D. The Terminations, Layoffs, and Recalls*

*1. Introduction*

The General Counsel contends that in February and March the Respondent unlawfully terminated eight employees. The Respondent offers an economic defense as to all but one whom it contends was fired for misconduct.

Specifically, the Respondent contends that it fired one employee, Timothy Jolly, for problems associated with drinking; terminated two employees, Connie Lane and

Jesse Canales, when their positions were eliminated as an economic measure; laid off five employees for economic reasons; and subsequently recalled four of the five who had been laid off.

*2. Timothy Jolly suspended, then fired*

There is no dispute that Timothy Jolly is a talented machinist. At the time of his February 19 discharge for intoxication, Jolly was drawing the top hourly pay of \$9.75. Williams candidly testified that Jolly is a very fine craftsman who could operate any of the several machines the Respondent has (Tr. 262, 333).

Hired in March 1978, Jolly served about 6 months in 1980 as foreman over the machine shop (Tr. 181, Jolly). Williams testified that he demoted Jolly to first-class machinist when Jolly came to work about 2 p.m. one day "hung over." (Tr. 262, 324) Williams testified that he did not send Jolly home that day, even though he considered Jolly "under the influence" of alcohol, because Jolly seemed rational and Williams thought he "possibly" could do his job (Tr. 324, 342). Williams testified that he would not let anyone work around the machinery unless he was in a condition to do so safely.<sup>20</sup> In fact, Williams testified that it is a standard rule at Baker Manufacturing to send employees home who are intoxicated (Tr. 343).

Jolly denied that his demotion was for coming to work intoxicated, and testified that it was because of attendance problems stemming from domestic troubles (Tr. 201). His timesheet (G.C. Exh. 5) for 1980 would support either version.

I credit both Williams and Jolly. As will be seen, it appears that Jolly drank often enough and to such late hours, that Williams could not be faulted for concluding that Jolly's attendance problems were due to his drinking. As no one contends that Jolly was stumbling drunk, it can be a matter of individual perception whether someone is intoxicated or "under the influence" in the absence of a blood test or breath analysis for checking the alcoholic content of the blood.

Williams testified that on a subsequent occasion Foreman Thomas Landes informed him that he had found it necessary to send Jolly home one day when the latter came to work drunk (Tr. 263). Landes identified a warning notice (R. Exh. 21) which reflects that on November 15, 1980, he sent Jolly home. The instrument is designated a "verbal" warning the text of which provides:

Offense: Reported to work in an intoxicated condition due to excessive drinking.

Remarks: He was sent home for the day with a warning not to let this happen again.

Landes' signature appears by the "Foreman" designation, but the signature after "Employee" is blank. It is customary, Landes conceded on cross-examination, to discuss such warnings with the affected employee and further customary that they have the option of signing. He admitted that he did not discuss this warning with

<sup>19</sup> From Thornton's answers, and the questions of both the General Counsel and the Respondent asking about any conversations with supervisors concerning union activities, it is clear that Thornton did not think of Williams in connection with the term "supervisor."

<sup>20</sup> There is no question that some of the machines are big and dangerous. Jolly confirmed this fact (Tr. 198) as did Machine Shop Foreman Thomas Landes (Tr. 423).



Jolly (Tr. 427). When asked why not, Landes responded, "Because at the time I didn't." Landes acknowledged that so far as he knew, Jolly was unaware that the warning slip existed.

Jolly denied ever receiving a warning of being intoxicated (Tr. 198), and testified that he had never reported to work intoxicated (Tr. 201).

Landes testified that Jolly had actually worked over an hour before Landes noticed that Jolly smelled of alcohol, that his color was flushed, his speech was not clear, and his eyes were red. On the other hand, Landes testified, Jolly was not stumbling and his speech was not incoherent. According to Landes, Jolly even suggested that he return home because he was not feeling well. (Tr. 419.)

The record contains the 1980 timesheet for Jolly, and the document reflects that Jolly actually was *absent* from work on Saturday, November 15, 1980 (G.C. Exh. 5). At page 29 of its brief, the Respondent argues, "As Landes testified, Jolly reported to work in an intoxicated condition and was sent home that day. This is confirmed by General Counsel Exhibit No. 5, which shows that Jolly did not work on the day he received the warning slip and was sent home prior to starting work." Of course, if Jolly was in fact sent home before he began work, then Landes erroneously testified that Jolly had worked between 1 and 2 hours on November 15, 1980. On the other hand, the timesheet, showing Jolly as being absent on November 15, indirectly supports Jolly's testimony that he never received a warning (even oral) for reporting to work intoxicated.

Jolly's testimony is not completely accurate either as to other events. Although he testified that he had not received a wage increase in over a year (Tr. 183), the employee record card maintained by Williams for each employee reflects that Jolly's last paid increase was effective on September 22, 1980 (R. Exh. 15). The same card reflects that Jolly was hired on March 1, 1978, whereas Jolly testified that his hire date was March 3, 1979 (Tr. 181).<sup>21</sup> But these are relatively minor points, and not bearing on material issues, not dispositive as to truthfulness or demeanor.

I credit both Jolly and Landes regarding the warning. A difference between their testimony, I find, is one of perception. Jolly did not consider himself being intoxicated when he reported to work on November 15, 1980. But he realized that, with his hangover from drinking, he was not feeling well enough to work—and he so told Landes. Foreman Landes agreed that Jolly should return home, made a brief comment which Jolly possibly did not hear that Jolly should not do this again, and Jolly left without working. The timesheet for Jolly is therefore accurate.

Landes, I find, incorrectly recalled the events of November 15 when he testified that Jolly had worked an hour or so.<sup>22</sup> After Jolly left on November 15, Landes

prepared the written evidence of an oral "warning." Landes simply embellished what had happened, for the incident was not at all such as to put Jolly on notice that he was being disciplined in any way or that a disciplinary record would be made.

Respecting the incident which led to his discharge, Jolly admits that he reported to work 2 hours late on Friday, February 13; that he had been drinking beer the previous night until nearly 1 a.m. (Tr. 198); and that he delayed reporting to work until about 9 a.m. to gain the extra sleep so that he would not be drunk (Tr. 199).

Landes testified that he smelled liquor on Jolly about 30 minutes after Jolly had arrived 2 hours late, that Jolly's words were slurred, that he did not appear to be in a frame of mind suitable for working, and that Jolly was intoxicated (Tr. 413, 421). Landes concedes that he did not send Jolly home on this occasion, but observed him every 15 minutes or so to ascertain that he was working safely, because he wanted to confer with Superintendent Homer Chastine before taking any action (Tr. 413).<sup>23</sup> The following day, a Saturday, Landes and Chastine discussed the matter and allegedly decided that Jolly would be suspended pending discharge. Although Jolly also worked that Saturday, it was not until Jolly reported for work on Monday, February 16, that he was notified, by Chastine, that he was "laid off" for 3 days because of the Friday incident.<sup>24</sup>

Later that Monday morning, Williams, Chastine, and Landes conferred on the matter. According to Williams, Chastine and Landes reported that Jolly, besides coming in late and intoxicated, had used "abusive" language, was overbearing, and they were considering terminating him (Tr. 323). Williams further testified that Jolly was terminated for coming on the job intoxicated, and that he took the word of Chastine and Landes that Jolly was intoxicated.

At trial, Landes did not describe any conduct by Jolly remotely approaching "abusive." Jolly testified that when he came in Chastine remarked, "Well, here comes our part-time help," to which Jolly responded, "Part-time help for a part-time employee." (Tr. 190.) While Jolly's response could be considered flippant, by no stretch of the imagination could it be called abusive, and the Respondent does not argue that such is what constituted the supposed "abusive" conduct. Landes testified that Williams made the decision that Jolly be discharged after he and Williams concluded that Jolly's (drinking-tardiness) problem was not going to improve and that they could no longer tolerate it (Tr. 414).

<sup>23</sup> Landes' testimony is not clear on this, for he testified that he told Chastine that same Friday morning about Jolly (Tr. 422). As Landes further testified that he did not decide until the following day, when he and Chastine conferred, that he would suspend Jolly pending discharge (Tr. 423), it is possible Landes meant that he and Chastine would not have a sufficient interlude to discuss the matter until Saturday, February 14.

<sup>24</sup> Jolly's quote of Chastine makes clear that the latter told him he was "laid off" for 3 days (Tr. 190). Chastine, who retired thereafter (Tr. 314, Williams), did not testify. I find that nothing was said to Jolly about a suspension pending review or possible discharge because, I find, Chastine and Landes had decided on Saturday that the penalty would be a 3-day suspension.

<sup>21</sup> As Jolly also described his tenure as being almost 3 years (Tr. 181), which would make the 1978 date correct, it seems that the Respondent's record card gives the correct date.

<sup>22</sup> When testifying, Landes initially merged the November 15, 1980, incident in the February 13, 1981, event which led to Jolly's discharge (Tr. 412).



On cross-examination, Jolly denied throwing a bolt at the feet of Landes on Friday or drinking coffee rather than working (Tr. 200). Although Landes did not describe these matters in his testimony, they appear in an undated memo (G.C. Exh. 23) which Landes admits he *personally* placed in Jolly's personnel file without showing to anyone (Tr. 426). The memo clearly was written at some unspecified time subsequent to Jolly's discharge. The text reads:

Timothy Jolly

Feb. 13, 1981 Tim came to work late in a[n] intoxicated state. He refused to go to work until he had chatted awhile and drank some coffee. His attitude was very indifferent toward myself & Mr. Chastain.<sup>25</sup>

When Mr. Chastain tried to talk to Tim about his work and his condition, Tim became very disrespectful. Later in the day, Tim purposefully threw a bolt at my feet as I was walking by, and made the remark that he had done it "on purpose to see what I would do." Tim spent a lot of time talking to different people the rest of the day, and did not produce enough work to prove that he was even there that day. Mr. Williams was ill and was not in, so I waited till he returned to work before taking any action.

When Mr. Williams and I did discuss Tim's actions on Fri. and the fact that he was sent home for a day for the same thing we decided to send him home for three days pending "discharge." When he returned, we decided to "discharge" Tim for being intoxicated on the job on two different occasions, his disrespectful attitude toward his supervisors, and his disinterest in his work, as well as being repeatedly late for work on several different occasions.

Day Foreman,  
/s/ Thomas D. Landes

On considering the foregoing in light of Landes' failure to describe the additional events in his sworn testimony, and in light of the fact that it is inconsistent with the trial version Landes gave on the sequence of the events and how the decision to suspend came about, and in view of Jolly's superior demeanor, I credit Jolly's denial that he engaged in the additional conduct attributed to him in the memo. I further find that Landes did not prepare the memo until long after the events, including after the instant charge had been filed, and that he then added fictitious facts to give a more serious appearance to the events of Friday, February 13. In short, I find that the memo is a spurious document. In fairness, I note that the Respondent does not rely upon it in any way.

When Jolly reported for work on Thursday, February 19, he was fired. Jolly testified that he met with both

Landes and Chastine, and that Landes informed him that he was fired. When Jolly asked why, Landes told him it was because he had come in late Friday and for being intoxicated (Tr. 189, 191). Although Jolly protested by saying he had been given a 3-day layoff for that incident, he received no answer.

Landes did not address the discharge conversation in his testimony. I credit Jolly's uncontradicted version.

### Conclusion

As I found earlier, when Williams was still in the hospital on Friday, February 13, John Haley, Baker Marine's executive vice president, telephoned Williams and gave him the names of the employees, including Jolly, who were organizing a union. As the Respondent observes at page 28 of its brief, mere knowledge does not establish motive, and "antiunion motive must be proved in order to establish a violation of Section 8(a)(3)."

A departure from past practice, or a disparity in treatment, may show an unlawful motive. There is no evidence here of a departure regarding either of these factors. For example, there is no evidence that the Respondent violated any past practice, or plant rules, by discharging Jolly without going through the steps of a progressive disciplinary system.

The Respondent admittedly had tolerated Jolly's drinking habit, and apparently a tardiness problem, no doubt because he is a superior machinist. But ability carries a person only so far. The Respondent's version—that its tolerance was exhausted—is not inherently improbable. However, other than through his demotion from foreman, Jolly had not been put on notice that his machinist position was in jeopardy. That is why his testimony about being "laid off" for 3 days as a disciplinary measure makes so much sense. Moreover, it was a penalty devised by Landes and Chastine without consulting with Williams. Landes obviously deemed that he had already "sent" Jolly home once, on November 15, 1980, for a similar incident. A 3-day suspension, as a major disciplinary action, came after Landes and Chastine had thoughtfully considered the matter. In short, they were applying a progressive disciplinary system.

But events intervened—the union activity and Williams' notice of same. I find that when Williams received a full report of the Jolly matter on Monday, February 16, he overruled the 3-day penalty and ordered that Jolly be fired. I further find that Williams took this action solely because of the knowledge he recently had gained that Jolly was among those employees spearheading the union organizing. Absent Jolly's union activities, I find, Jolly would not have been discharged, but would have been returned to work on Thursday, February 19. Accordingly, I shall order the Respondent to offer Jolly reinstatement. The backpay period begins on February 19, 1981, and the amount of backpay shall be determined in the compliance stage.

<sup>25</sup> As Landes' spelling of the shop superintendent's name differs from that which appears elsewhere in the record and the Respondent's brief, I have not conformed the spelling in this Decision to the version given by Landes.

### 3. The economic terminations and layoffs

#### a. *The Respondent's overall economic defense*

The Respondent contends that the 6-week lockout at Baker Marine disrupted the flow of parts sent to the Respondent for machine work. Williams testified that it shut off about 90 percent of these items (Tr. 251, 280, and 390). Ultimately, he modified that somewhat by conceding that since the Respondent received a few parts from independent vendors, the 90 percent was "probably not" correct (Tr. 398). He further testified that the full impact of the lockout was not felt at Baker Marine for about a month because the Respondent had a backlog of work to be done plus it had the rework of some primary gear boxes. By late February or early March, however, interim cost-cutting measures were not enough, and Williams made the final decision that machinists would have to be laid off. Williams, Chastine, and Landes conferred in late February and selected the machinists who would be retained and those who would be laid off. The selection process is discussed in more detail below.

The Respondent introduced a color-coded graph or chart (R. Exh. 20) for the period of September 1980 through June 1981 by month, with supporting daily summaries, showing (1) a red line depicting the actual man-hours used in the machine shop, (2) an orange line showing equipment shipped in terms of estimated manhours, (3) a blue line for parts and equipment received (the receivings) for machining in terms of estimated manhours, (4) a green line tracing the average manhours expended in completing shipped equipment, and (5) a brown line showing the target established by Baker Marine for the average manhours scheduled for the various machines in the machine shop. Williams explained each of the exhibits.<sup>26</sup>

One of the summaries (R. Exh. 19) compares the estimated hours for "receivings" with the actual manhour worked and gives the difference in terms of manhours actually worked in excess of receiving, i.e., in excess of the hours the Respondent (and/or Baker Marine) estimated would be required to machine the items.

The General Counsel argues that while the Respondent's chart and summaries add color and a lot of self-serving figures to the record, they do not cover "the crucial factor in determining whether the Respondent's asserted defense was something other than a sham." (Br., p. 14.) The availability of work, as the General Counsel observes, is not reflected by the Respondent's exhibits. The General Counsel argues, therefore, that the exhibits are unreliable because they show only "half the picture—only the half that the Respondent wanted us to see."<sup>27</sup> He argues, in effect, that the Respondent's eco-

nomie defense is fatally deficient because it fails to show the single most important figure—what work was available.

Testifying that he keeps no inventory of items "in the working process," Williams further explained, "I have no way of actually determining the actual amount of work that I have in the yard, except through my experience through the past 30 years as to my workload and my work out in the yard." (Tr. 301.) Williams meant, it seems, that he eyeballs the inventory in the yard and mentally correlates that with the materials being received, with the job orders (on hand and anticipated), and with the available work force and equipment in light of his 30 years of experience. Indeed, Williams testified that he went into the yard and personally observed the amount of work (inventory) which was available (Tr. 314). There was *not* a lot of parts stacked in the yard to be machined, he testified (Tr. 252). "I could see that my supply of material was going down fast and I was receiving very little." (Tr. 315.) He concluded, therefore, that some machinists had to be laid off.

In contrast to Williams' testimony about there not being a lot of parts stacked in the yard, several employees testified that at the time of their March layoff there was at least a month's work of parts for their machines stacked in the yard (Tr. 118, 119, Appleton; Tr. 132, Strahm; Tr. 142, 143, Thornton; and Tr. 193, Jolly).

When asked to comment about the employees' testimony that there were parts present there, Williams explained (Tr. 313):

In some cases I did have some work. Some of the large gears, some of the elevating gear units, and some few winch cases. These pieces are only run on two kinds of machines,<sup>28</sup> and with a lot of the work cut off from the Baker Marine, Cabiness Field, I don't machine some of the pieces until I get the other. We have a corrosion problem, and if you go ahead and machine it and let it sit outside, then all that rust forms on it and you have a tremendous cleaning problem [before] you can weld on it.

Even earlier in his testimony, Williams asserted that while there was some work (i.e., receivings) coming in during the time in question (February-March), most of it was for the larger machines (apparently the horizontal boring mills, the vertical boring mills, and evidently the

<sup>26</sup> Williams testified that Baker Marine sends the Respondent a computer printout showing the production schedule Baker Marine expects from the latter (Tr. 299, 382).

<sup>27</sup> There is some question, at least in terms of the process of resolving credibility, whether the figures are even one half the picture. Missing are figures for the other half of the Respondent's operation, the assembly department. While the record is quite vague on the matter, it seems that some work the two departments do is independent of the other. This independent work is shipped out without going to the other department. Yet other components apparently go through both departments. On the work which goes through both departments, it seems that the first work

(other than possibly sandblasting) is done in the machine shop. If this latter work is described as a pig passing through a python, one necessarily would want to see a chart which tracks, in figures, the progress of the pig through the entire python—not just through the first half. I do not rely on this possible gap in the data, however, for any of my findings, for the relationship between the two departments is not sufficiently shown in the record.

<sup>28</sup> Williams identified the machines as the horizontal boring mills and the vertical boring mills (Tr. 315), and that the more experienced and talented machinists, such as first-class and some second-class operators, frequently operated these machines (Tr. 271, 337, 338). However, he would classify an operator only as third class if he could run only a horizontal boring mill (Tr. 271).

small mill), and not for the smaller machines like lathes and the radial drill presses (Tr. 285).<sup>29</sup>

It is undisputed that the Respondent had a backlog of work from Baker Marine in the last 4 months of 1980, and that during the same period the Respondent had to remachine a lot of primary gear boxes. According to Williams, the Respondent caught up with the backlog in January (Tr. 371, 408),<sup>30</sup> and completed reworking the primary gear boxes in February (Tr. 372).

Williams testified that Baker Marine's lockout was about a month old, or around the first of March, before the Respondent "really felt the effects of it." (Tr. 252.) Apparently relying chiefly on the color-coded chart (R. Exh. 20), the Respondent argues as follows in its brief (p. 33):

Although the Company concedes that no records clearly show the amount of work on hand at any one time the records do show that a substantial decrease in materials received for work occurred concurrently with the completion and shipment of the backlog of work.

The Respondent then observes that although witnesses testified that they saw work lying in the yard in March, Williams testified that there were very few parts in the yard (Tr. 252), particularly those that could be worked on because of the mix needed (for the small machines) and not available (Tr. 315).

Further in its brief the Respondent argues (p. 34):

It is important to note that when materials received increased to previous levels, the employees who were laid off were [except for one] recalled. As shown on Respondent's Exhibit 20, materials received decreased substantially in February and March, 1981.

The demeanor of the employee machinists was superior to that of Williams, and I credit them over him. Aside from the demeanor factor, there are other reasons I find Williams to be an unreliable witness. For example, even Machine Shop Foreman Landes<sup>31</sup> contradicted Williams on significant matters. One point is the time when Williams first discussed with Chastine and Landes the possibility that a layoff would be necessary. According to Williams, he first alerted Chastine and Landes to this possibility in early February (Tr. 307). Landes denied this emphatically, and testified that he first learned of it

when he was called to Williams' office and they then and there selected the employees for layoff (Tr. 429).<sup>32</sup>

According to Williams, he discussed the union badges with Landes the Friday after his return from the hospital, or Friday, February 20 (Tr. 326, 329).<sup>33</sup> Yet Landes flatly ever denies discussing the union badges with Williams (Tr. 431, 433).

Another factor influencing my finding that Williams is an unreliable witness is his testimony that the lockout caused a 90-percent reduction in the parts received/work available issue.<sup>34</sup> First of all, Williams vacillated from characterizing the impact as a reduction in the parts received (Tr. 251) to a reduction of the machine shop's work (Tr. 280, 285). He ended by linking and merging the two (Tr. 396).

But aside from the shifting nature of Williams' testimony on the 9-percent factor, the more substantial flaw is that it is clear that none of the evidence supports a conclusion that the Respondent's available work, if it decreased at all, dropped anything like 90 percent in the February-March period.

Inspecting the Respondent's summaries of items shipped (R. Exh. 19), one observes, contrary to the Respondent's argument at page 33 of its brief about a confluence of events, that although "receivings" did fall in February and March products shipped by the Respondent in March, while down in February, shot up the highest figure in the entire summary and did not drop off very much in April.<sup>35</sup>

The drop from 4413 shipping hours<sup>36</sup> at the end of January to 1525 at the end of February does produce a drop of just over 65 percent. But in March, the month of the layoffs, shipments of estimated hours shot up over 225 percent to the figure of 4963 hours, or more than the end of January figure of 4413 hours. The numbers of the entire summaries of hours shipped is simply a graph of peaks and valleys. Thus, beginning at the end of Septem-

<sup>29</sup> Williams called this the final decision meeting and places it in late February or the first week of March (Tr. 211). He also testified that about February 18 Larry Baker Jr. instructed him to lay off experienced machinists, if necessary (Tr. 332).

<sup>30</sup> As the union badges appeared on February 25, Williams apparently meant Friday, February 27—the second Friday after his return from the hospital.

<sup>31</sup> Williams testified that although he did seek work from firms other than Baker Marine during a slow work period in 1979, he did not do so during the 1981 lockout (Tr. 406). He explained that he did not do so because he wanted to be ready to accept Baker Marine's work without other work causing an interference. Yet, earlier he testified that Larry Baker Jr. told him about February 18 that the lockout might last 6 months (Tr. 332). He thereafter modified that to say that it was in late March (obviously February) when Baker told him about the anticipated length of the lockout, and that Baker simply indicated that he did not know how long the lockout would last (Tr. 406).

<sup>32</sup> Counsels' statement in their brief is incorrect because they evidently argue from the Respondent's color-coded chart (R. Exh. 20). The chart presents a distorted picture because the figures are placed at the *beginning* of the months on the graph line when in reality the numbers are based on transactions occurring over the length of each month. Thus, the figures should be placed at the *end* of each month to show the accumulated total for that month.

<sup>33</sup> Except for the actual manhours graph line, the entire chart is expressed in terms of the hours *estimated* in advance that it will take to machine the items (Tr. 356, 363, and 369, Williams). The exhibit which shows actual manhours worked is R. Exh. 16, a listing of employees by machine groups with actual hours worked.

<sup>29</sup> The Respondent groups its machines under five categories: Horizontal boring mills, lathes, vertical turret lathes, radial drill presses, and small mills. The record contains references to employees who operate vertical boring mills. The latter term apparently is used by the Respondent interchangeably with the vertical turret lathe. This is in accordance with industry practice. See *Encyclopedia Americana*, 273 (4th ed. 1966), Boring and Boring Machines.

<sup>30</sup> Initially Williams testified that there was no "great" backlog in the December 1980-January 1981 period (Tr. 251). That seems consistent with his testimony that the backlog was eliminated by some point in January.

<sup>31</sup> Although I have found that Landes authored a spurious document (G.C. Exh. 23) regarding Jolly, and even though I do not credit him generally, I find him to be more believable than Williams.

ber 1980 and concluding with the end of June 1981 the figures are: 4907; 3276; 1318; 4413; 1525; 4963; 4710; 2505; and 2592.

In mentioning valleys, it should be noted that the lowest valley of all occurred in December 1980 when only 1318 hours were shipped.<sup>37</sup>

Turning now to the *receivings*, we see another fluctuating graph line, although not as dramatic as in the *shippings*, revealing the following numbers beginning with the end of September and concluding at the end of June: 3266;<sup>38</sup> 1811; 1247; 2652; 2940; 1945; (February) 1447; (March) 2369; 3074 and 1920. The drop from 2940 hours received at the end of January to 1940 at the end of February is a decline of slightly under 34 percent. The March decline to 1447 hours added another 25-percent drop. Thus, the total drop for February-March was about 50.78 percent. While that is a substantial decrease, other important factors must be considered. April saw an increase of nearly 64 percent to 2369 hours.

When asked about the November low point of 1247, Williams testified that no one was laid off then because "the material was there," and "probably" because of the reworking he was doing at that time on the primary gear boxes he was falling behind in his schedule and "Baker Marine had probably shifted their schedule to allow for this." (Tr. 394.) Williams explained that reworking the primary gear boxes took much of the time until their January completion, and that parts received during January-February would go into the yard to be worked on when he had manpower available (Tr. 393).

Williams, in essence, was describing a lag time which takes place before the machining is actually done. He admitted that there is a "possible" lag time between the items received and the time they are actually machined (Tr. 404), and the same as to another lag time between machining and shipping (Tr. 366).

In short, despite the Respondent's argument on brief to the effect that the layoffs coincided with the conjunction of a low level in *receivings* and a high level of *shippings*, thereby implying that the machine shop had very little work available as of mid-March, the facts show the contrary to be true. Aside from the credited testimony of the employees that there was at least a month's work

available in the yard, there are other factors revealing fatal flaws in the Respondent's argument. As described already, the Respondent's argument frequently is based on its color coded chart which presents an incorrect picture. Moreover, the Respondent's economic defense exhibits are rendered almost meaningless by virtue of the admitted lag times involved between *receivings* work and between work *shippings*.<sup>39</sup> It is clear from the following analysis of the shipping order numbers that the lag times are greater than Williams conceded.

The lag time effect is illustrated best by the shipping order numbers on the shipping and receiving exhibits. For example, as the shipping's exhibit (R. Exh. 18) reflects, the work shipped in January, February, and March bear shipping order numbers in the 10,400, 10,500, and 10,600 series.<sup>40</sup> Work shipped in April and May expand into the higher series of 10,700 and 10,800 with one being an odd number of 23,251 shipped on May 19.

Looking at the shipping order numbers on the *receivings* summary (R. Exh. 17), none of the numbers correspond to those enumerated on the exhibit of items shipped.<sup>41</sup> Shipping (work) order numbers for January on the Ingleside *receiving* are generally in the 23,300 series, and Cabiness' are in the 17,000 to 20,000 series. The February and March numbers on the *receivings* just get even higher, reaching into the 33,000 series from Ingleside.

The conclusion which I am compelled to draw from the foregoing correlation of shipping order (work order) numbers is that work orders received the *receivings*, do not get shipped out as work completed, the *shippings*, until several months later.<sup>42</sup> Thus, not only was the lag time during this period greater than what Williams described, it gives solid support to the testimony of the machinist witnesses that there was in fact a great deal of work available when they were laid off.

Clearly the counterpoint made by Williams about the work in the yard being for the big machines, but no parts for the small machines (the lathes and drill presses), is invalid because of the lag time factor. The *receivings* figures for the small machines do not bear out what he said when the lag time that even he described is considered. This is demonstrated by the following *receivings* hours reflected in the pages of Respondent's Exhibit 17 for the lathes and drill presses:

<sup>37</sup> This highlights another problem in attempting to rely on the Respondent's shipping-receiving summaries. The actual hours worked by the Respondent's machinists in December 1980, as taken from pp. 4 and 5 of R. Exh. 16, were 5692 (dropping the fraction). Clearly, the two do not reconcile, and the same is true to a lesser degree regarding the other months. The reason, as Williams conceded, is that there can be a lag time of even 2 months between the time the work is done and the date the item is shipped (Tr. 366, 392, 409).

There also are technical problems in attempting to reconcile the 1980 figures. Some of the numbers in the summaries do not match a few of the numbers on the chart. The confusion possibly stems from the fact that the summaries are expressed in terms of months whereas the actual manhours are based on an exhibit, R. Exh. 16, which carries actual manhours on separate pages of 4 weeks each. That creates a certain reconciliation problem in trying to compare figures between the different exhibits. To add to the confusion, the weeks of 1980 are shown as beginning on Mondays in R. Exh. 16, the exhibit showing the actual manhours, but in 1981, the weeks are shown beginning with Sundays.

<sup>38</sup> The number of 3656 shown on the Respondent's color coded chart is incorrect because in transferring the hours of 1360 on p. 2 to p. 1 of R. Exh. 17, the typist transposed the number to 1630. The error is carried forward to the chart, R. Exh. 20.

<sup>39</sup> These lag times are to be distinguished from the normal lag time between the date an item is received and the date it is shipped. The lag times referred to above occur between the date an item is received and the work is done, and again between the time of work and the date of shipment.

<sup>40</sup> Only 1 of the 87 shipping orders for that period bears a number less than 10,000, and it was shipped on January 12.

<sup>41</sup> The double reference to shipping order numbers is less confusing if one thinks in terms of work order numbers which are received and shipped.

<sup>42</sup> Whether the delay in doing the machining for these work orders is the result of a temporary problem caused by having to rework the primary gear boxes is not clear inasmuch as the record does not contain statistics for the last 2 to 4 years for comparison purposes.

<i>Source</i>	<i>Month</i>	<i>Lathe</i>	<i>Drill Press</i>
Ingleside	9/80	70	370
	10/80	145	294
	11/80	3	184
	12/80	0	261
	1/81	0	190
	3/81	0	64
	4/81	0	70
	5/81	0	271
	6/81	0	56
Cabiness	9/80	640	577
	10/80	86	238
	11/80	13	151
	12/80	643	416
	1/81	781	469
	2/81	51	136
	3/81	496	290
	4/81	556	467
	5/81	446	531
	6/81	154	408
TESCO	9/80	12	0
	10/80	0	0
	11/80	0	0
	12/80	153	54
	1/81	63	27
	2/81	270	90
	3/81	36	3
	4/81	3	9
	5/81	170	75
	6/81	139	45
Forge Products	9/80	146	102
	10/80	0	0
	11/80	56	42
	12/80	0	0
	1/81	0	0
	2/81	12	9
	3/81	56	42
	4/81	92	69
	5/81	0	0
	6/81	96	72

ARMCO (The parts from this vendor are not broken down into the type of machine which is used.)

As is readily apparent, most of the work for these smaller machines came from the Cabiness Field facility. A substantial drop is shown for February. Once again, however, the work (shipping) order numbers for these items are in the 20,000 series, whereas the order numbers for December 1980 are in the 17,000 series and for January in the 17,000 to 20,000 series. Items *shipped* from January through May, with the single exception noted for January 12, range from the 10,400 series to the 10,800 series, with one 23,000 series on May 19.

Aside from the fact I do not credit Williams because of the demeanor factor, it is clear that the Respondent's own exhibits do not support his testimony. Other reasons for my finding Williams to be an unreliable witness appear in the balance of this decision and will not be recounted here. Suffice to say, almost every point Williams

made is either disproved by the Respondent's own exhibits or discredited on demeanor grounds.

#### Conclusion

Based on the foregoing analysis, and the entire record, I conclude that there is no merit to the Respondent's overall economic defense. Although a corrected chart would show that the graph lines, including actual man-hours worked, tend to converge around mid-May in the general vicinity of the target line Baker Marine set for the Respondent, that can be attributed to a number of influences calling for speculation.

The most that can be said for the Respondent's overall economic argument is that the late spring graph line could tend to support an economic argument *if* Williams were credited in other respects. But I have not credited him.

In short, I find that as of February 1 the Respondent was behind in its work. As Williams told Debra Karstedt at that time, the lockout would give the Respondent "the opportunity to catch up." (Tr. 180.)<sup>43</sup> The Respondent argues that it caught up about a month later. Not only do I not credit Williams in that respect, but the Respondent's own work order numbers support the opposite version, that of the machinists, that there was plenty of work when they left in March.

#### b. The economic defense and the selection process

Williams testified that in the first week of February, Larry Baker Jr. told him to see if he could lay off some people to assist Baker Marine in managing its *cash flow* situation. In fact, in this conversation, they allegedly discussed and settled upon the following order of priority for cutting costs (Tr. 309):

1. Eliminate unnecessary overhead jobs.
2. Cancel unnecessary purchases.
3. Lay off employees.

Williams testified that he had a (possible) conversation with Larry Baker Jr., that such occurred about February 18 or 19, that John Haley participated, in which Williams was told to let experienced machinists go, if necessary, because it appeared that the lockout might last 6 months (Tr. 332). Williams subsequently hedged on the "6 months" by testifying that Baker said he did not know how long it could be, and that it possibly "could be a while." (Tr. 406.) In this last testimonial description, Williams seems to suggest that his conversation with Baker occurred "[r]ight at the end of March." Williams obviously meant at the end of February. However, his testimony on this subject, and with other topics, is confusing at best. In any event, it demonstrates his unreliability as a witness.

We recall that at his meeting with the machinists on Monday, February 16, Williams not only said nothing

<sup>43</sup> The transcript records Karstedt as quoting "Pat Temple." The reference to "Pat" is an error in the transcript. In her testimony, Karstedt frequently referred to Williams by his given name of Temple. I find that Karstedt referred to "Temple," meaning Temple Williams, and did not say "Pat" Temple.

about the possibility of economic cuts, layoffs or a reduction in available work, but affirmatively told employees they need not worry about the lockout because the Respondent had plenty of work (Tr. 116, Appleton). As we have seen, the Respondent did indeed. When drill press operator Gene Wright Jr. Inquired at the meeting whether employees, in light of their 58-hour weeks, could possibly get some Saturdays off, Williams replied that he was "unsure," but that possibly they would (Tr. 53, Wright).

In view of the February 18 conversation Williams had with Baker Marine officials about layoffs, it probably was in late February that Williams first told Landes of any need for a reduction-in-force. They made the selections then. Moreover, Jolly testified that around the beginning of the lockout there was a rumor that the Respondent would be shut down when Baker Marine, including Cabiness Field, shut down.<sup>44</sup> Jolly then asked Landes if the Respondent's employees needed to worry about their jobs. Landes replied (Tr. 193):

Tim don't you ever worry about us running out of work, we've got more work than we know what to do with. Just because Cabiness is going to shut down a while, that don't mean nothing. We can stockpile that yard with . . .

I credit Jolly in his foregoing testimony over Landes and his generalized denial (Tr. 418).

#### Conclusion

I am persuaded that Baker and Williams did have a conversation in early February in which they discussed the Respondent's situation in view of the lockout. I find that they recognized that the Respondent had plenty of work to carry it for many weeks, even months, to come. I further find that Baker did not then, or ever, express the idea that the lockout would be a long time. Instead, I find that he expressed the idea to Williams that the lockout probably would not last more than a few weeks, and that the Respondent, accordingly, should not attempt to bid for work with other companies.

The very theme Williams expressed in his February 16 meeting with the machinists was that the Respondent had plenty of work. Although, as I have found, Williams exploded at them, impliedly because of the union activity of the group of one dozen, Williams had not yet devised a counteroffensive to the union activity. That plan came possibly the next day, but no later than February 18 when he discussed matters again with Baker. Rather than Baker being concerned about a cash flow problem at Baker Marine, to be alleviated by, if necessary, layoffs by the Respondent, he and Williams, I find, discussed two related matters.<sup>45</sup> First, they decided to eliminate as

many union adherents as it could. Second, they decided to do so under the cloak of economic cost-cutting measures. Lane was terminated pursuant to that plan that very day (assuming the conversation occurred on February 18), and Jolly went the day after.

The layoff selection was a bit more complicated than the termination of Lane and Jolly. But its unlawful nature is shown in part, as we shall see, by the fact that only union supporters were laid off. This is not to say that the Respondent did not allow attrition to reduce its machine shop complement. To the extent that attrition reduced the Respondent's machine shop payroll, that fact fit into the economic argument Baker and Williams had devised. Even on that score, however, Williams would not let attrition alone, for he hired two machine shop employees after his February 18 discussion with Baker. The following sections discuss the selection process in more detail.

#### c. Connie Lane terminated

Before her termination on Wednesday, February 18, Connie Lane had been the toolroom attendant since she was hired on April 14, 1980 (Tr. 210). Her supervisor was Landes. In her position, Lane had frequent contact with the different machinists because she checked out tools and other items, provided nuts and bolts, and sharpened drill bits and tools for the machine shop.

On February 18, Machine Shop Superintendent Homer Chastine informed Lane that he felt badly having to tell her that the Respondent was eliminating her job that very day (Tr. 215). Chastine told Lane that the Respondent intended to build a warehouse and would no longer have a toolroom. Lane had not received any previous indication of any of this. Indeed, she had just received a pay increase effective Monday, February 2.<sup>46</sup>

Williams testified that Lane's job was abolished in an effort to eliminate unnecessary overhead costs (Tr. 260). He decided to eliminate Lane's job and return to the system used on the second shift in which leadmen and foremen go to the toolroom and obtain the necessary tools and parts. Williams implied that one advantage of this system is better security since the toolroom attendant would not know whether a machinist in fact needed a tool or, especially, an expensive part (Tr. 261). For example, even nuts and bolts range in cost as high as \$26.

Lane conceded that no supervisor had discussed the Union with her (Tr. 219). Of course, she was terminated before the union supporters began wearing their union badges. Indeed, it was Lane's termination which prompted the union supporters to publicly identify their position with the union badges.

As of the time of the trial, the Respondent had not replaced Lane and was utilizing the system described by Williams.

Chastine did not explain to Lane, nor Williams at trial, just why it was so necessary for the Respondent to eliminate Lane's position with such abruptness in the middle

<sup>44</sup> Jolly's testimony is rather imprecise on whether the rumor preceded the lockout or developed about the time the lockout first occurred.

<sup>45</sup> As discussed in more detail in my final conclusions, it does not seem logical that Baker Marine was suffering a cash flow problem. In view of the fact that they had just locked out 560 production employees, thereby nearly eliminating its payroll expense, it makes no sense to say that Baker Marine had a cash flow problem. The dollars and the facts just do not add up.

<sup>46</sup> Williams wrote on her employee record card that Lane "is doing a very good job." (G.C. Exh. 13.) The Respondent hired a new employee for the warehouse on February 6, a cleanup employee on February 9, and another cleanup employee on March 3.

of the pay period.<sup>47</sup> The layoffs, as we shall see, occurred on Fridays. While it may be debatable whether Friday or Saturday should be considered the end of a normal pay week, it is clear that either day is right at the end of the pay week, and Wednesday at the middle. I find that the abruptness of Lane's termination, in the middle of a pay week, and in light of the other layoffs and terminations, to be an indicium of unlawful motivation. The abruptness takes on more meaning when we recall, as the General Counsel observes, that Lane (1) had frequent contact with numerous employees, and (2) dated Jolly.<sup>48</sup>

#### Conclusion

The conclusion is inescapable that the Respondent, in an effort to freeze the union movement, initially terminated two (Jolly and Lane) of the group doing the organizing, including eliminating these two because they had frequent contact with the other employees.<sup>49</sup>

The timing of Lane's abrupt termination is another factor reflecting an unlawfully motivated discharge. Thus, she was terminated on Williams' third day back in the plant after the hospital stay in which he learned of Lane's membership in the union organizing group. And her termination followed by only 2 days the fiery address Williams made to the machine shop employees on Monday, February 16. The abruptness of Lane's termination demonstrates that the strong animus Williams expressed on February 16 manifested itself that same week in the terminations of Lane and Jolly.

The Respondent hired employee Gary Thomas for the warehouse on February 6 (R. Exh. 14). When the Respondent terminated Lane, Thomas had been there less than 2 weeks and had barely started his probationary period.

Jasper Guillen was hired on February 9 in the position of cleanup (R. Exh. 14). While the record does not demonstrate that seniority among regular employees is a significant factor in retention during layoffs at the Respondent's facility, the credited testimony of machinist Strahm, describing his February 27 conversation with Williams, reflects that Williams told Strahm that seniority did mean "something." (Tr. 129). One must therefore wonder about the Respondent's retaining probationary employees, in job classifications apparently requiring no skills different from those possessed by Lane, while

abruptly terminating Lane, who had nearly a year's experience with the Respondent. By Williams' own account, Lane was doing "a very good job" and learning to grind drills and tools (R. Exh. 13; Tr. 260).

From the testimony of Thornton, it appears that David Saunders, hired March 3 in the position of cleanup, was permitted to train on or operate the drill press of Edward Brown who was laid off on March 6 (Tr. 143-144). As such information is not reflected in the Respondent's summary for machine hours by operators (R. Exh. 16), I find that Saunders merely trained on the radial drill press at times when he was not performing necessary cleaning chores. However, the point to be made is that Lane, with nearly a year's seniority, and already having demonstrated that she possessed certain machine shop skills, was laid off not even 2 weeks before the Respondent hired a probationary employee whom, it almost immediately permitted to train part-time on drill press. The failure to retain Lane, or recall her for this or the jobs of other recent new hires, smacks of a lack of good faith in the Respondent's story.

In light of all factors, I find that the Respondent terminated Lane when it did because of her union activities. Accordingly, I shall order the Respondent to offer Lane reinstatement to her former position of toolroom attendant and to reestablish that position if she accepts.

#### d. Jesus A. Canales terminated

Prior to beginning work with the Respondent on October 5, 1980, Jesus (Jesse) A. Canales worked for 8 months at Baker Marine where he was a class B maintenance electrician and a member of the Steelworkers. At Baker Marine in September 1980, Foreman Steve Shaw asked Canales if he wanted to transfer to the Respondent. Canales agreed. He thereafter went through the hiring process at Baker Manufacturing where, he testified, he was hired as class A maintenance electrician. In Canales' early October 1980 interview with Williams, the latter told Canales that the Respondent had no union and *did not want one* (Tr. 61).

Canales thereafter performed all the electrical maintenance at the Respondent except when he occasionally needed the assistance of Baker Marine's Steve Shaw or Electrical Specialists, an independent electrical contractor from nearby Corpus Christi. He also did some testing on the electrical motors of the gear boxes and performed some production work on electric cranes. I do not credit Williams in his testimony that Canales did no electrical testing on the gear boxes (Tr. 340).

When Canales received notice from Williams the first part of February of 50-cent-per-hour pay increase at the end of his probationary period, Williams told Canales that he would try to get Canales more money later, that there was a lot of work, and that he knew that Canales would grow with the Company over the coming years (Tr. 64).<sup>50</sup> In this pay increase interview, Canales said he

<sup>47</sup> Of the eight employee record cards in evidence (G.C. Exhs. 10-16; R. Exh. 16), seven reflect that Williams made raises effective on Mondays. I therefore find that Mondays are the first workday in the Respondent's pay periods. Although no explanation is apparent why Williams made Canales' probationary completion raise effective on Saturday, February 7 (G.C. Exh. 12), I consider that to be an aberration. I note that the probationary completion raise for Appleton was made effective for Monday, February 2 (G.C. Exh. 10) Sundays are possibly the first day of the pay periods beginning in 1981, for that is the date shown at the top of the 1981 workweek columns in the actual hours exhibit contained in the record (Exh. 16).

<sup>48</sup> Jolly testified that he had a lot of freedom to move about the shop and that he was used to operate different machines around the shop (Tr. 182).

<sup>49</sup> Gene Wright Jr. credibly testified that after the group began wearing their union badges, Landes confined him to his work station by telling him that he was not to circulate or to use the forklift to go outside the building for parts (Tr. 156).

<sup>50</sup> Canales testified that the conversation occurred the "first part" of February (Tr. 64). I therefore find that this conversation occurred shortly before Williams entered the hospital even though the execution date which appears on Canales' employee record card (G.C. Exh. 12) appears

*Continued*



wanted to take some electrical courses at night school and inquired whether the Respondent would help him with the educational costs. Williams replied that he would try to obtain reimbursement for Canales (Tr. 64, 83). Canales thereafter enrolled in a course described as "basic motor control." He had not received a final word from Williams about reimbursement by the time of his termination.

When Canales reported to work the morning of Saturday, February 28, Shop Foreman Landes called Canales, who was wearing his union badge, into the office where he gave Canales his final check, dated February 27, and told him that he was no longer needed by the Company (Tr. 79). When Canales asked why, Landes replied, "We don't need you anymore." Landes would not elaborate on this answer, and he did not address the subject of Canales' termination in his own testimony.

Williams, who testified that he made the decision to terminate Canales, explained that he had hired Canales mainly to work on the electrical cranes the Respondent was preparing to build (Tr. 258).<sup>51</sup> At that (October) time Williams supposedly did not have a lot of work for Canales to do, so he assigned him to do the electrical maintenance. While Canales would handle some of the work to Williams' satisfaction, Canales was unable to take care of the large equipment.

Williams testified that the Respondent ceased building electric cranes in 1980. Thereafter, the only work Canales had was basically the shop electrical maintenance. The reason Canales still worked 50 to 55 hours a week, Williams testified, was because (Tr. 259):

As a maintenance worker, he was required to be there to take care of anything that might happen during the normal working hours for the rest of the people.

Testifying that he has not replaced Canales, Williams explained that the maintenance work has been handled by Electrical Specialists, the independent contractor from Corpus Christi which has assisted Canales from time to time (Tr. 259). In fact, Williams testified that some of the equipment in the shop is quite old, having been made as far back as 1936, and that electrical breakdowns occur often. He estimated that the electrical contractor had been called out two or three times a week even when Canales was there and about the same number since Canales has been gone. However, Williams testified that he only hires the electrical contractor to come out when there is a machine breakdown (Tr. 320). In short, it appears that Williams testified that machine maintenance, other than at breakdowns, has not been performed.

Canales testified in a far more believable fashion than Williams. In the nearly 5 months he was employed by the Respondent, Canales testified that he called upon the

assistance of Baker Marine's Steve Shaw only about six times, and the independent electrical contractor no more than two or three times (Tr. 63, 81).

### Conclusion

Canales testified with sincerity and in a straightforward manner. His demeanor was convincing whereas that of Williams was not.

Although there is no direct evidence that the Respondent terminated Canales because of his union activities, I infer from all the circumstances that such was the Respondent's motivation. First of all, I disbelieve Williams in his testimony that when the union badges appeared it caused him no concern "because I really didn't care." (Tr. 330.) I find that he cared very much, and that the only reason the badges did not prompt an outburst of animosity from him was because he already, on February 16, had reacted angrily following the telephonic notice he had received from Haley on Friday, February 13.

Second, Williams' testimony that Canales was hired primarily to be a production worker on electric cranes, which the Respondent phased out in less than 2 months, has an exceedingly false ring. Canales made the transfer, retaining his 8 months prior seniority with Baker Marine, from the position of class B maintenance electrician to the Respondent as a class A *maintenance* electrician. He took a promotion in the electrical maintenance field, not a transfer to a production job on an assembly line.

Third, Williams' testimony about Canales proving a bit inadequate cannot be squared with Williams' own handwriting on Canales' probationary wage increase barely 2 weeks before Canales was terminated (G.C. Exh. 12) "This employee has completed his probationary period and is doing a good job."

Added to the foregoing is the fact that Williams even told Canales he would seek to obtain reimbursement for any electrical courses Canales took at night college. All of these factors demonstrate that the occasional use of an independent contractor for complicated jobs is completely consistent with the fact that Williams was pleased with Canales' performance. In any event, Williams is unpersuasive in seeking here to argue both ways. On the one hand, he testified that Canales was hired primarily as a production worker, yet he then faulted Canales because he was not an expert industrial electrician. Such shifting of positions, and Williams' various twists and turns, further demonstrate his unbelievability.

On hiring Canales, Williams told him that the Respondent did not have a union and did not want one. When Canales became active, and particularly when he appeared at work wearing a union badge, Williams, I find, made the decision to terminate Canales because of the latter's support the union movement.

I further find that the Respondent's reasons regarding Canales' termination, including its economic defense, are a total sham fabricated by Williams as a pretext to hide the real reason he fired Canales. That the Respondent had hired no replacement for Canales does not disprove the foregoing in the circumstances of this case. The work is there and the Respondent has chosen, for unlawful reasons, not to do some of it (some of the mainte-

<sup>51</sup> to be February 13, the date Williams left the hospital. Williams testified that although he stopped by the shop on his way home from the hospital, he was there no more than 30 minutes at the end of the shift and apparently felt weak (Tr. 322).

<sup>52</sup> Canales refers to this as production work (Tr. 63). Apparently both meant that Canales installed the electrical wiring.

nance) and to have an independent contractor perform what has been done (repairing the machine breakdowns.) Accordingly, I shall order that the Respondent offer Canales reinstatement to his former position. Backpay, with interest, shall include reimbursement for any electrical courses Canales has taken if the compliance investigation discloses that the Respondent would have reimbursed Canales absent his unlawful discharge.

*e. The selection process for the March layoffs*

(1) Introduction

As the lockout continued, the work to be performed by the Respondent allegedly diminished. Williams testified that about 20 employees severed their employment with the Respondent in February-March (Tr. 253). During the same period, Williams testified, only seven employees were hired (Tr. 254).<sup>52</sup> Of these seven, two were hired for machine shop positions. The Respondent's list of hires (G.C. Exh. 14) reflects that five employees were hired in February, two in March, none in April, and one in May. Thereafter, the hiring picks up with 10 in June, 5 in July, 11 in August, and so on. The data for the February-March hires is:

Date	Name	Job	Rate
2-6	Gary Thomas	Warehouse	\$6.50
2-9	Jasper Guillen	Clean Up	5.00
2-13	Timothy Edwards	Painter	7.50
2-19	William Key	Milling Machine	8.00
2-23	Alfred Scott	Boring Mill	8.50
3-3	David Saunders	Clean Up	5.00
3-19	James Wilson	Painter	9.50

Only Key and Scott were hired for the machine shop. Scott, Williams testified (Tr. 349), was fired for absenteeism in about the middle of the week beginning Sunday, March 1 (R. Exh. 16, p. 7).

Williams further testified that in late February or early March he met with Roger Smith, assembly superintendent, Homer Chastine, machine shop superintendent, and Thomas Landes, machine shop foreman and made the selection of those to be laid off.<sup>53</sup>

At different places in his testimony, Williams gave slightly different numbers for the total employee complement of the production employees in the two separate departments. In general, it appears from his testimony that there were about 60 production employees divided in approximately equal segments of 30 employees in the machine shop and assembly department (Tr. 36, 305, and

400). Although Williams testified that the assembly department was subject to the layoff, it appears that none of that department's employees was laid off.<sup>54</sup> At trial, Williams explained in a rather vague fashion that there was more of a pressing need to lay off employees from the machine shop than from assembly because the Respondent still had work for assembly (Tr. 402). The assembly department does the sandblasting, which apparently would precede the work done in the machine shop. On the jobs that assembly does in conjunction with the machine shop, it appears that many of the work functions in assembly, such as assembling, welding, and painting, would take place after the work done in the machine shop.

There is no testimony or other evidence which clearly shows the staggered relationship of the work that these two departments share. As earlier observed, it seems that some of the work the departments do is independent of the other and, apparently, is shipped directly to Baker Marine without going through the other department. It is unclear what percentage of the total this independent work constitutes. Whether an economic layoff would soon have been forthcoming in assembly as its share of the work flowing in from the machine shop or directly from Baker Marine dropped to a lower level consistent with the Respondent's overall situation, is not adequately described.<sup>55</sup> So far as the record reflects none of the employees who wore union badges were assembly employees.<sup>56</sup>

As for the machine shop, Williams testified that he, Chastine, and Landes decided that they would not use the 1979 economic cutback formula or reduced hours while retaining nearly everyone because in 1979 that procedure had caused machinists in demand to quit for other jobs. Instead, they purportedly decided to lay off about one-third of the work force. Williams testified that all third-class machinists/operators were selected for layoff (Tr. 304),<sup>57</sup> and the best qualified, that is the most versatile, of multitalented, such as first class, would be retained for the work that the Respondent had (Tr. 24, 256, and 333). Landes' testimony is consistent with this (Tr. 417, 428).

At trial, Williams, utilizing the list of operators by machines (R. Exh. 16), gave the names of those laid off, fired, quit, and retained (Tr. 345). To assist in understanding this discussion or this point better the following list is taken from the exhibit page Williams utilized at hearing (R. Exh. 16, p. 6). Williams testified that he had no actual list before him at the time of the layoff deci-

<sup>52</sup> The Respondent did not offer a list of the terminations. A few are identified by Williams, but he did not list names of those in the 20 who were from assembly. Extrapolating from R. Exh. 16, it seems that 12 machinists departed during this period, including Herman Arrendondo, a badge wearer, about March 29, and Alfred Scott, fired a few days after his employment. It also includes Jolly and the five laid-off discriminatees. Canales and Lane make a total of 14. That would mean 6 of the 20 came from assembly. That number conforms to the five or six quits or terminations from assembly testified to by Williams (Tr. 401-402).

<sup>53</sup> As Williams did not always include Roger Smith in his list at trial (Tr. 30, 311, 313, and 316), it seems likely that he actually met separately with the supervisors of the two departments.

<sup>54</sup> There was some attrition in assembly, however, during an unspecified span of time during that general period. As noted above Williams testified that five or six assembly employees either quit or were terminated during this time (Tr. 401). It is unclear how many of the six were quits and whether the "terminated" means disciplinary discharges or economic terminations.

<sup>55</sup> Regardless of the lack of an adequate description, I have found that the Respondent's economic defense is without merit.

<sup>56</sup> The possible exception is one Mike Lewey, named by Debra Karsted (Tr. 168), whose name appears in an earlier charge (G.C. Exh. 18) which, according to the undisputed representation of the Respondent's counsel at trial (Tr. 274), was withdrawn.

<sup>57</sup> As we shall see in a moment, Williams in fact retained some third-class machinists who did not wear the union badge.

sion but was familiar with the names (Tr. 312, 333). In the last column shown, the week beginning Sunday, February 22,<sup>58</sup> the employees listed, under the five machine groups, are shown below.<sup>59</sup> I have not deleted Jolly's name, although it was deleted from the list with his discharge a few days earlier. Also, I have added a column for the classification rating given to each by Williams either at trial or in the evaluation cards in evidence. Where Williams testified that an employee was between, for example, third class and second class, I have shown him as the lower of the two on the basis that Williams had not yet promoted the employee to the next higher classification. An asterisk beside a name denotes an employee who wore the "Yes Union" badge. The five machinists laid off in March are italicized.

### 1. Horizontal Boring Mill

Name	Class
*Rhea, P.	1st
*Arrendondo, H.	1st
*Jolly, T.	1st
*Strackbein, R.	2nd
*Kuykendall, C.	3rd
Merritt, M.	3rd
Delamure, W.	3rd
*Thornton, G.	2nd
McKinstry, A.	1st
Steward, J.	1st

### 2. Lathe

Name	Class
Collins P.	1st
*Strahm, R.	2nd
Cribley, G.	1st
Martinez, R.	1st
Martinez, R.	1st
Stamper, G.	2nd
Salinas, J.	1st

### 3. Vertical Turret Lathe

Name	Class
Baker, J.	3rd
Fraley, S.	2nd
*Appleton, K.	2nd

<sup>58</sup> That is the last week in February and would probably have been the names Williams had available to him when he, Chastine, and Landes made their layoff selection in late February. According to Williams, it was about February 18 that Baker Marine officials told him to lay off experienced machinists, if necessary (Tr. 332). One would assume that Williams would have made his layoff selection promptly. Even a week's delay would appear strange in view of the instructions, from Larry Baker Jr. and Baker Marine's cash flow situation which, by implication, was in adverse straits.

<sup>59</sup> Although Williams testified that he did not lay off by machine group, the Respondent apparently carried the employees by machine group for its own information purposes, and I simply repeat that listing here. The groups are numbered by the sequence in which they appear on the exhibit page.

### 3. Vertical Turret Lathe—Continued

Name	Class
Kistner, M.	2nd

### 4. Radial Drill Press

Name	Class
Wyrick, W.	1st
*Wright, G.	2nd
Sanchez, A.	1st
Garcia, E.	1st
*Brown, E.	2nd

### 5. Milling Machine

Name	Class
Key, W.	2nd

The foregoing list doubtlessly includes those who worked the night shift. When the day shift gathered to hear Williams' fiery address of February 16, the number of machinists present were around 18 to 20. It therefore appears that second shift was composed of no more than 8 to 10 machinists. While Williams testified that he "thought" some of the second-shift machinists were laid off (Tr. 307), there is no record evidence that any were, and I find that none from the second shift was laid off.

As far as numbers are concerned, I note that Williams testified that he decided to reduce the work force by "close to a third" at that time with the prospect of more later if the work did not pick up (Tr. 333). This was not to be a cut applied to each job group, but simply a total. Attrition through discharges and quits would be used, and such departures would not be replaced, with actual layoffs being the last choice. Although Williams testified that the machine shop consisted of 30 to 31 machinists (Tr. 305), that number is about three over the number shown on Respondent's Exhibit 16 which is the list of machine employees by name, grouped by machine operated, and showing the hours each worked from September 19, 1980, to July 1981. As the list shows the normal machinist complement to be about 27 or 28, it is likely that the 30 to 31 Williams mentioned included the two supervisors, Chastine and Landes, toolroom attendant Connie Lane, and possibly David Saunders, hired as a cleanup person on March 3 (when the Respondent ostensibly needed to cut its work force). As already noted, Saunders worked in the machine shop.

In any event, it would seem that the machine shop work force would need to be reduced by no more than eight employees even if Williams is credited.<sup>60</sup> But for

<sup>60</sup> Williams testified unpersuasively about the one-third he needed to lay off. In view of Williams' unreliability, and in view of my findings that the Respondent's overall economic defense lacks merit, I find that the one-third total given by Williams was nothing more than a pretextual formula arrived at only after determining the number of union supporters he could eliminate by adopting a formula.

the purpose of his discussion, the eight is derived by being a figure only slightly over one-third the 25 (excluding Jolly) in the list of machinists set forth above. Starting, therefore, from the figure of 25, and not reducing the number by any of those named in the instant complaint, we see that the first subtraction is for the three who were fired between the end of February and early March before the layoffs (C. Kuykendall, G. Stamper, and J. Baker). Of these three, Kuykendall and Baker were third-class machinists. The now revised total of 22 would be reduced by the two other third-class machinists, M. Merritt and D. Delamure, giving a total of 20. That figure would be reduced by not hiring machinist William Key on February 19 and Alfred Scott on February 23 to produce a total of 18.<sup>61</sup> After all, it was on February 18 (even earlier under Williams' version) that Baker Marine told Williams to lay off machinists, if necessary, to reduce costs. Williams offered no explanation in support of his hiring Key and Scott when he knew he might have to lay off experienced machinists. Based on their pay rates, Key and Scott apparently would have been listed as second class. That computes to a total reduction of seven employees, substantially satisfying Williams' pretextual reduction goal of "close to a third of the production workers." If Donald Diehl, fired in mid-February by Williams (Tr. 351), is counted as part of the attrition, then the full eight would be satisfied. In short, had Williams followed his own guidelines of using attrition and not retaining any third-class machinists, he would not have touched any of the five he laid off in March.

By looking at the column under March 22, 1981, on the list, we see that the machine shop's work force actually was reduced to the figure of 17. The lower figure was simply the result of the Respondent's unlawful actions already found, including Jolly's discharge. I observe from Respondent's Exhibit 16 that first-class machinist Pat Rhea, a badge wearer, left at the same time Strahm and Thornton were laid off. First-class machinist Herman Arrendondo, another badge wearer, departed the last of March. Although Warren Delamure worked no hours the week of March 22, he nevertheless remained an employee, as the weeks thereafter show and as Williams testified (Tr. 347).

By failing to follow its own work force reduction guidelines as to numbers, including not hiring new employees, and in selecting only union supporters for layoff while retaining third-class machinists who ostensibly were not supporting the union movement, the Respondent demonstrated that it was unlawfully motivated in the selections it made. Although this finding would avoid the necessity of discussing the layoffs of Appleton, Brown,

<sup>61</sup> Key was hired as a milling machine operator. Scott was hired as a boring mill operator but wound up being assigned to the lathe group. Their very hiring during this period serves to highlight the artificial basis of the "economic" layoff. One also must wonder why the Respondent could hire James Wilson on March 19, 1981, as a painter in the assembly department. By this time the Respondent certainly knew that its workload in assembly would be diminishing very soon when the impact of the reduced work force, and less work, reached assembly.

and Wright on March 6, and Strahm and Thornton on March 13, I nevertheless shall treat their cases briefly.

## (2) Gary S. Thornton

Under the first machine group, Horizontal Boring Mill, there are 10 names counting Jolly. Williams, without contradiction, identified five as being first class (Rhea, Arrendondo, Perez, McKinstry, and Stewart). All five were retained. Of the five, Rhea and Arrendondo wore union badges.<sup>62</sup> Strackbein, a second-class machinist and named union supporter, also was retained.

Williams classified three as being between third and second class: C. Kuykendall, M. Merritt, and Gary Thornton, Charging Party herein (Tr. 346).<sup>63</sup> Kuykendall, a named union supporter, was fired the first week of March because of absenteeism. Merritt, not shown to be a union supporter, was retained,<sup>64</sup> but Thornton, identified to Williams did not explain at trial why Delamure, whom he rated as third class, was retained while Thornton was laid off.

I do not credit Williams in his testimony that the union badges were not a factor in the selection process (Tr. 384). In view of the other violations I have found, and in light of the thinly veiled animosity Williams directed at the union supporter in his February 16 meeting, I find that the real reason the Respondent retained Delamure and Merritt and selected Thornton for layoff was because Thornton was a union supporter and Delamure and Merritt were not.

As the record reflects, Thornton was recalled "in your capacity as a Horizontal Boring Mill Operator" by letter dated April 27, 1981 (R. Exh. 3).<sup>65</sup> The letter reads:

Dear Mr. Thornton:

This to advise you that you are being recalled in your capacity as a Horizontal Boring Mill Operator.

Please notify this office of your decision within three (3) working days after receipt of this letter of your availability to return to work. Upon your notification, we will advise you of the date, location, and shift that we would like for you to report.

<sup>62</sup> Williams' former secretary, Debra Karsteed, testified that she included Rhea's name among those that she gave Haley on February 13 (Tr. 168). At trial she did not include Arrendondo among the names she listed as having been given to Haley. I find that to have been an oversight in her testimony and that she in fact reported Arrendondo's name. This is so because she identified "Herman" (Arrendondo) as being one of the group which came to her home the night of February 12 requesting an employee list as an aid for their organizing (Tr. 167).

<sup>63</sup> Williams erroneously included Thornton in this group. Earlier Williams described him as second class (Tr. 303). The employee record card Williams maintained on Thornton shows that Williams, in giving Thornton a 50-cent per hour raise effective January 26, rated Thornton as "2nd Class Machinist." (G.C. Exh. 15.) On January 29, Williams inscribed the following description of Thornton on the card: "This is one of our best employees, a good worker, always at work, and does a good job."

<sup>64</sup> Williams testified that Warren Delamure a third-class horizontal boring mill operator (Tr. 346) was still employed (Tr. 347). The Respondent's list of hours the machinists worked in the weeks from September 1980 to June 1981 (R. Exh. 16) reflects that Delamure was not laid off. Delamure was not among those wearing union badges.

<sup>65</sup> Williams testified that Thornton was the first machinist to be recalled (Tr. 384).

Failure to respond within the three working days of the receipt of this letter will result in your removal from the employment rolls.

Sincerely,

/s/ Temple Williams  
Temple Williams  
Manager

Thornton testified that after he received the letter he communicated with Williams and Landes but declined the offer (Tr. 147): "Because it was not for the same position that I had been laid off and I had a better paying job at the time."

No further evidence was elicited or offered on this subject. Without discussion, the General Counsel argues in his brief that the Respondent must offer Thornton and the others, "full and immediate reinstatement with backpay." As will be seen later, I find certain deficiencies in the recall letter in the circumstances of the others. Unlike the others who were recalled but did not answer their recall letters, Thornton conferred with Williams and Landes before declining the offer.

Frequently it is appropriate to defer to the compliance stage resolution of the question whether an employer's reinstatement offer is valid. In our case, however, the General Counsel alleged in complaint paragraph 11 that the Respondent "has failed and refused, and continued to fail and refuse, to reinstate" Thornton. By so alleging, the General Counsel put the Respondent on notice that the matter would be litigated. The Respondent came prepared to litigate the issue, and introduced the recall letters it sent to Thornton and others. At least as to Thornton, the General Counsel had the burden to litigate the issue in this proceeding, or at least show that the circumstances were such that the matter could not be fully litigated and would need to be resolved at the compliance stage. No such showing was made here by the General Counsel regarding Thornton despite Thornton's testimony that he conferred with Williams and Landes. We are not told just what, in Thornton's opinion, reduced the offered position of horizontal boring mill operator different from the same job description he had occupied before his layoff.

As a due-process ticket, the complaint is good for only one ride. *Peyton Packing Co.*, 129 NLRB 1358, 1360 (1961); *Jefferson Chemical Co.*, 200 NLRB 992 (1972). The General Counsel's ride is over. Accordingly, I shall not order the Respondent to offer Thornton reinstatement. His backpay period spans the dates of March 13 to April 27, 1981.

### (3) Roger Strahm

Hired January 7, 1980, Roger Strahm described himself as being a "machinist" (Tr. 125). Williams describes Strahm as being a second-class lathe operator (Tr. 303, 348). He was laid off on March 13 and was never recalled. In effect he has been terminated in view of the many machinists the Respondent has hired since.

Of the seven lathe operators, Alfred Scott, who had been hired on February 23 as a horizontal boring mill operator, was fired the first week of March for absentee-

ism. G. Stamper also was fired the first week in March. Williams testified that the others, excluding Strahm, were first-class lathe operators (Tr. 348). No evidence in the record contradicts that testimony. Strahm, therefore, was laid off. The four retained apparently did not wear union badges.

Strahm was not recalled because of problems he had with excessive scrappage. He conceded at trial that Williams had talked to him a couple of times and Landes several times about this problem, and that in some instances he indeed was at fault (Tr. 136). The last conversation he had with either of them concerning this problem before March 1981 was in December 1980.<sup>66</sup>

Around March 10 or 11, during the time Strahm wore a union badge, he concededly received a warning slip from Landes for a mistake when he was working on a different lathe. The part was not scrapped. The complaint does not allege this warning to have been unlawfully motivated, and the issue does not seem to have been fully litigated insofar as finding the warning to have been unlawful. There is no evidence showing whether the warning was a departure from past practice in any way. While the warning may have a suspicious air, no other disparity has been shown. Accordingly, I shall not find that the warning is indicative of animus toward Strahm.

Williams testified that when marginal employees are not recalled from a layoff, the layoff serves as their termination (Tr. 318). The Respondent has since hired several boring mill operators, drill press operators and, in November, two lathe operators for the night shift and one day-shift lathe operator. It would therefore appear that Strahm, in effect, has been discharged.

When Landes told Strahm on March 13 that he was being laid off because of the slow work resulting from a lockout, he estimated that Strahm would be off work about a month (Tr. 129). Strahm asked to speak with Williams, and a little later Williams came to see Strahm.

During the ensuing conversation, Williams told Strahm that he would be off work 6 to 8 weeks, recommended that he look for a job with a different employer, and said he would give Strahm a good recommendation. Strahm inquired whether the layoffs were because of the union badges, and Williams replied no (Tr. 130). They then discussed seniority, and Williams stated he was keeping employees he thought were best for the Company even though they were less senior than Strahm.

Strahm observed that the Respondent had just hired a janitor and he, Strahm, would willingly take that job until work picked up when he could return to his machine.<sup>67</sup> Williams responded that Strahm would not like

<sup>66</sup> In the semiannual evaluation report Williams completed for Strahm on January 29, Williams wrote, "This employee is doing a good job, and is dependable." (G.C. Exh. 14.)

<sup>67</sup> The most recently hired "Clean Up" person was David Saunders who was hired just 10 days earlier (R. Exh. 14). During Strahm's last week of employment, Saunders was observed by Edward Brown, who had returned to retrieve his toolbox, operating Brown's drill press (Tr. 106). Charging Party Thornton gave similar credible testimony (Tr. 143).

that work and that he could not have the job. Strahm then cleaned out his tool box and departed the premises.

I find that Strahm in fact was selected for layoff because of his union activity. Williams testified that the whole theory underlying his 1981 layoff procedure was to avoid the undesirable 1979 results and to retain his good machinists.<sup>68</sup> Although Strahm was the only union badge wearer of the lathe operators, he also was the only second-class machinist, whereas the four retained were first class.

If Strahm was in fact a marginal employee, then Williams' decision to lay him off, to suggest that he find permanent work elsewhere, and not to recall him is understandable. What Williams was saying, in effect, is that while Strahm was not bad enough to be fired, neither was he good enough to be recalled once he was gone.

That brings us back to a consideration of Strahm's January 29 semiannual evaluation by Williams. As it predates the lockout, Williams' February 13 knowledge of the identity of the union adherents and the union badges, I find it to be a more reliable indication of the Respondent's true assessment of Strahm than either the March warning to Strahm (not alleged to be unlawful) or Williams' postevents testimony. As we saw above, that late January assessment is that Strahm not only is a good machinist, but he is also a *dependable* one. In Jolly's case, the Respondent contended that even though Jolly was very talented, his dependability supposedly was so bad that he had to be fired. Here Williams thought enough of Strahm's dependability to emphasize it when giving him a pay raise with his semiannual evaluation. Moreover, Williams' assessment of dependability is borne out by a review of Strahm's 1980 and 1981 work calendars (G.C. Exh. 7). Most entries show that he worked well over 50 hours for most weeks. His calendars are very similar to those of Thornton—whom the Respondent recalled first.

Under all these circumstances, I must conclude that Williams selected Strahm for layoff because of his union activity, and refused to recall him for the same reason. This is not to find that Strahm should have bumped David Saunders in the latter's cleanup position, or anyone else. Accordingly, I shall order the Respondent to offer Strahm reinstatement.

#### (4) Kenneth Appleton

Hired in mid-July 1980, Kenneth Appleton was laid off March 6 as were union supporters Gene E. Wright Jr. and Edward Brown. Appleton was one of the three vertical turret lathe operators. A fourth, J. Baker, had been fired at the end of February. Of the three, Williams rated Appleton the lowest at second class, with S. Fraley

as almost a first class and M. Kistner being "about a first class." (Tr. 350.) So far as the record shows, only Appleton was a known union supporter.

We must recall that Williams testified that he was not laying off by machine group, but by the criterion of quality, laying off those who were the least qualified, such as those who created scrappage, and who were the least versatile in operating different machines (Tr. 24, 256, and 333).<sup>69</sup>

Appleton admitted that in January he received a warning for sleeping on the job (Tr. 117, 120). No further details are given on the subject, and neither Williams nor Landes refer to it in their testimony. Landes apparently said nothing about it when he told Appleton he was being laid off for lack of work. (Tr. 117.)

On January 29, Williams wrote the following about Appleton in granting him a 50-cent-per-hour pay raise effective February 2 (G.C. Exh. 10): "This employee has finished his probationary period and is doing a fine job."

As that evaluation was subsequent to the warning which occurred during the *probationary* period, I am compelled to assume that whatever Appleton's sleeping incident entailed, the Respondent deemed the matter closed with the end of Appleton's probation on the basis that as a good machinist he was very valuable to the Respondent. In any event, neither Williams nor Landes mentioned the warning to Appleton on March 6 or at trial. As they did not express any reliance on it, I shall not presume any in the circumstances here. *Associated Milk Producers*, 259 NLRB 1033, 1035 fn. 9 (1982); *Inland Steel Co.*, 257 NLRB 65 (1981).

Although the record does not demonstrate whether Appleton was capable of operating other equipment, and it contains no evaluation or comparison of his versatility and flexibility, those deficiencies are not determinative here where I have found not only that the Respondent's economic defense is without merit, but also that Appleton, and the other layoff discriminatees, would not have been reached for layoff in any event in view of my earlier analysis of the effect of the number of discharges, quits, hires—and Williams' motivation.

By letters dated June 8, Williams recalled Appleton by letter (R. Exh. 2) the text of which, except for the job classification, was identical to that quoted above which was sent to Thornton. The job classification is specified as "Vertical Boring Mill Operator."

The position description of vertical boring mill operator is used interchangeably with vertical turret lathe operator by Respondent and Williams (Tr. 303, 350). Appleton testified that he did not respond to the recall letter because he had a job (Tr. 122). The matter was not further developed.

The General Counsel, as previously noted, argues in his brief that the Respondent must offer Appleton "full and immediate reinstatement with backpay." In contrast to Thornton's case, I agree that the Respondent must

<sup>68</sup> As Williams conceded, those retained were rewarded with a \$500 bonus, apparently in May (Tr. 306). The Respondent also increased its top pay rate from \$9.75 to \$10 per hour in May. This is reflected in the Respondent's date of hire exhibit (R. Exh. 14) showing Joseph Ando hired as a boring mill operator on May 11 at \$10 per hour. There is some reason to conclude that the rate of \$10.40 shown for assembly mechanic Richard Hisle, hired June 29, may be a typographical error. As Williams confirmed, the top rate had been \$9.75 earlier in 1981 (Tr. 257). Presumably the Respondent was keeping pace with area rates, including any recent increases at Baker Marine. Thus, when Edward Brown returned from layoff on July 15, he returned at a rate 50 cents per hour higher than he was earning at the time of his March layoff.

<sup>69</sup> Williams' criteria do not appear in one list. At one point he testified that he did not retain any third-class employees (Tr. 304). At p. 14 of its brief, the Respondent contends that "Employees who quit or were terminated were not replaced." The latter is certainly an implied criterion of Williams.

offer Appleton immediate and full reinstatement to his former position, but I do so on the basis that the recall letter was not a valid offer of full reinstatement without loss of seniority and other privileges. For example, Appleton could reasonably assume that his next semiannual pay raise evaluation might be pushed back by the 3 months he had been in layoff status. The letter also leaves to the Respondent's discretion whether it will assign Appleton to the day shift, from which he was laid off, or to the night shift. That discretionary factor further serves to make the recall letter an unconditional offer to reinstate Appleton to his former job.<sup>70</sup> That Appleton chose to remain in his interim job in these circumstances did not constitute abandonment of his former job at Baker Manufacturing. Accordingly, a valid offer of reinstatement must be made. The backpay computation, of course, will consider Appleton's interim earnings.

#### (5) Gene E. Wright Jr.

Hired April 7, 1980,<sup>71</sup> Gene E. Wright Jr. was one of the three machinists, all wearers of the union badge, who were laid off on March 6. He was one of those fingered by Karstedt (Tr. 168), and among the dozen who donned the union badges on February 5 (Tr. 151). Foreman Landes, normally friendly toward Wright, adopted a strictly business manner with Wright after the latter began wearing his union badge (Tr. 152).<sup>72</sup> about mid-February, Landes, I find, told Edward Brown that he would do everything in his power to keep a union out of the Respondent's shop (Tr. 96). This occurred shortly before Brown became aware of the union movement himself, and was part of a brief discussion Brown and Landes had about unions.

On January 29, Williams signed the card promoting Wright to second-class machinist effective February 2, 1981 (G.C. Exh. 16).<sup>73</sup> Williams lauded Wright for learning fast, doing "very good" work, and for being dependable. On March 6, Landes told Wright that he was being laid off because there was not enough work for him (Tr. 154). Landes assured Wright that he was not being suspended or discharged, and that his layoff was for approximately 4 to 6 weeks.

At trial Wright was asked his job classification (machinists), but was not asked to name the equipment he operated. At one point in his testimony, Williams listed

Wright as a lathe operator (Tr. 336). At another he described Wright as a radial drill press operator (Tr. 350), and it is under that machine group of Respondent's Exhibit 16 that Wright is listed. In the Respondent's May 7 recall letter to Wright, Williams states that his recalling Wright "in your capacity as a Universal Mill Operator." (R. Exh. 4.) Except for the job classification, the text of the recall letter is the same as the message, quoted above, sent to Thornton. The reference is the only one in the record to a "universal mill." As a second-class machinist, it seems clear that Wright was capable of operating a variety of machines.

Based on the analysis set forth earlier, I find that Wright would not have been laid off. He testified that he did not respond to the recall letter because he had another job (Tr. 160). In view of the differences in the record descriptions of Wright's former job, and upon the findings already made concerning the deficiencies of the recall letter to Appleton, I shall order the Respondent to offer Wright full reinstatement to his "former job."<sup>74</sup>

#### (6) Edward Brown

Like Appleton and Wright, Edward Brown was laid off March 6 by Foreman Landes who told him that his layoff for lack of work was indefinite (Tr. 98). From the time of his November 21, 1980, hiring until his layoff, Brown never received any warnings.<sup>75</sup> By letter dated June 8, Williams recalled Brown "in your capacity as a Drill Press Operator." (R. Exh. 1.) At trial, Williams described Brown as a second-class radial drill press operator (Tr. 336, 351). Brown testified that he was granted a delay in his return date. He ultimately reported back to his old job of drill press operator on July 15 with a pay increase of 50 cents per hour (Tr. 99, 104). Brown, therefore, was the only one of the four recalled who actually accepted his recall and returned to work.

Based on the other findings previously made, I find that the Respondent was unlawfully motivated in selecting Brown for layoff. As Brown returned to his old job, and there is no indication that he has not received his full seniority or other benefits and privileges, the Respondent need not offer him reinstatement. Backpay, with interest, will be computed in the normal manner.

### E. Concluding Findings

The idea that in early February Baker Marine was suffering a cash flow problem does not make sense. Some 560 production employees had just been locked out, and that would create an immediate cash saving for the near term.<sup>76</sup> I stress the near term because over the long term

<sup>70</sup> Where the former job is in existence, reinstatement must be to that job. An employer does not have the option of choosing a "substantially equivalent job." *The Chase National Bank*, 65 NLRB 827 (1946); *Trustees of Boston University*, 224 NLRB 1385 (1976), enf'd. 548 F.2d 391 (1st Cir. 1977).

<sup>71</sup> Although Wright reported his hire date as May 7, 1980 (Tr. 149), pay records in evidence record it as April 7, 1982 (G.C. Exhs. 9, 16).

<sup>72</sup> I credit Wright notwithstanding the fact his pretrial affidavit contains no reference to Landes' change in attitude (Tr. 160). The contents of a pretrial affidavit depend largely upon the energy, skill, experience, and dedication of the investigating Board agent. *Golden Hours Convalescent Hospital*, 182 NLRB 796, 801 fn. 13 (1970); *Standard Forge & Axle Co.*, 170 NLRB 784, 786 fn. 8 (1968), and also on the hour and conditions under which the affidavit is taken, *Galeton Production Co.*, 182 NLRB 135, 140 fn. 30 (1970) (omissions because of lateness of the hour); *Holiday Inn*, 176 NLRB 903, 905 fn. 7 (1969) (omissions resulted from witness having to tend to a 15-month old child on her lap).

<sup>73</sup> At one point Williams referred to Wright as being third class (Tr. 336), but later correctly named him as being second class (Tr. 350).

<sup>74</sup> The letter may need to be in just such words in view of the different equipment Wright apparently operated.

<sup>75</sup> On January 29, Williams, in granting Brown a 50-cent-per-hour pay raise effective February 2, wrote (G.C. Exh. 11):

This employee is doing a very good job and knows his job. He will do anything necessary to get the job done.

<sup>76</sup> To illustrate, if one assumes that the average hourly wage of the 560 employees was \$7, then the hourly savings for Baker Marine was \$3920, or \$156,800 per week. In 1 month the savings would have been some \$679,466.



Baker Marine could not stay in business, at its former size, by operating with only its supervisory staff. Nevertheless, one must assume that Baker Marine did not lock out its 560 production employees on the spur of the moment. I therefore find that Baker Marine engaged in some advance planning which included either stockpiling parts or selecting the most propitious moment respecting the delivery of finished products to its customers.

I do not credit Williams in his testimony that he and Larry Baker Jr. set a priority list for reduction of costs. The unlawful nature and manner of Williams' termination of Lane and Canales demonstrates, and I find, that the professed object of eliminating their jobs as a cost-cutting measure was a pretext advanced to mask the Respondent's real objective of reducing the ranks of union supporters.

In the face of the body of evidence showing an unlawful motive in the discharges, and also in the selection of those for layoff, Williams gave no explanation of why the Respondent hired new employees, including those hired for assembly, when he supposedly needed to reduce the payroll.<sup>77</sup>

Looking back at the date of those who wore the union badge, and I find that all were reported by Karstedt to Haley who in turn gave the names to Williams,<sup>78</sup> we see the following results:

	Name	Classification	Fate
1.	Kenneth Appleton	Second class	Laid off
2.	Herman Arrendondo	First class	Retained <sup>79</sup>
3.	Edward Brown	Second class	Laid off
4.	Jesse Canales	First class	Terminated
	Electrician		
5.	Tim Jolly	First class	Fired
6.	Clay Kuykendall	Third class	Fired
7.	Connie Lane	Toolroom	Terminated
8.	Pat Rhea	First class	Retained
9.	Roger Strackbein	Second class	Retained
10.	Roger Strahm	Second class	Laid off
11.	Gary Thornton	Second class	Laid off
12.	Gene Wright	Second class	Laid off

Kuykendall was fired the first week of March for absenteeism. Other employees who did not support the union movement were fired for similar reasons in the February-March period, and the General Counsel does not allege that Kuykendall's discharge was unlawfully motivated. Of the 11 who are left on the list, Arrendondo and Rhea should not be counted in our analysis

<sup>77</sup> There is no evidence suggesting that Baker Marine wanted the Respondent to remain at full production as a psychological maneuver designed to persuade its unionized employees to pressure the Steelworkers to come to contractual terms with the Respondent so that the 560 employees could be working like the unrepresented employees at the Respondent.

<sup>78</sup> While I realize that the transcript records Karstedt as reporting the name of Kile Lewey, I have not included the name here. He was not a machine shop employee. It is not even certain that he worked in the assembly department.

<sup>79</sup> As reflected at p. 8 of R. Exh. 16, Arrendondo's employment ceased about March 30. The charge in an earlier case, Case 23-CA-8442, alleges that Arrendondo was discharged unlawfully on March 23 (G.C. Exh. 18). That charge is not part of this case and it apparently was withdrawn (Tr. 274).

because they were first-class machinists, and under Williams' guidelines first-class operators would be the last to go. In short, they were untouchable for the March layoffs. As it turns out, Rhea left at the same time Strahm and Thornton were laid off, and Arrendondo departed about March 30.

Of the group of nine remaining (not counting Arrendondo, Rhea, or Kuykendall), the Respondent managed to lay off, terminate, or discharge all but one, Roger Strackbein. As earlier noted, second-class machinists Appleton, Brown, Thornton, Strahm, and Wright, wearer of the union badges, were laid off while third-class operators Warren Delamure and Michael Merritt, who did not wear the union badges, were retained—contrary to Williams' specific testimony that no third-class employees were retained (Tr. 304). During this period when the Respondent supposedly needed to cut its costs, and Williams would date that need as beginning in the first week of February, the Respondent hired two machinists, William Key and Alfred Scott (R. Exh. 14), and two painters for the assembly department, not to mention the two hired as cleanup. None of these new hires is named as being among those who wore the union badge.

In short, the foregoing numbers suggest that something other than mere coincidence was at work here. I find that other factor to be the Respondent's illegal motivation. Such a lopsided percentage favoring layoff/termination of only union supporters is indicative of an unlawful motivation and has been so recognized by the Board and the courts. *Camco, Inc.*, 140 NLRB 361, 363-366 (1962), *enfd.* on point 340 F.2d 803 (5th Cir. 1965).

Finally, I have found that if Williams had followed his own guidelines of not hiring new employees, of not retaining third-class employees, and had not pretextually discharged/terminated Jolly and Lane, none of those named as discriminatees herein would have been affected by any true layoff. Accordingly, all but Gary S. Thornton and Edward Brown must be offered reinstatement. Thornton's recall was, or should have been, fully litigated, and Brown appears to have been reinstated.

#### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Steelworkers is a labor organization within the meaning of Section 2(5) of the Act.

3. The IUE is a labor organization within the meaning of Section 2(5) of the Act.

4. The Respondent has violated Section 8(a)(1) of the Act by unlawfully surveilling its employees by photographing those wearing union badges at their work stations, and by impliedly threatening an employee with unspecified future reprisals if he did not cease supporting the union organizing movement among the Respondent's employees.

5. The Respondent has violated Section 8(a)(3) and (1) of the Act by discharging Timothy Jolly on February 19, 1981; by terminating Connie Lane on February 18, 1981, and Jesus A. Canales on February 28, 1981; and by

laying off Kenneth Appleton, Edward Brown, and Gene E. Wright, Jr. on March 6, 1981, and Roger Strahm and Gary S. Thornton on March 13, 1981.

6. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. The Respondent has not violated Section 8(a)(1) of the Act as alleged in the complaint except as set forth above.

#### THE REMEDY

Having found that the Respondent has engaged in the unfair labor practices set forth above, I shall recommend that it be ordered to cease and desist therefrom, to take affirmative action designed to effectuate the policies of the Act, and to post signed and dated copies of an appropriate notice to employees.

In view of the foregoing, I shall recommend that the Respondent be ordered to offer the below-named employees full and immediate reinstatement to their former jobs or, with the exceptions to follow, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

The Respondent must reestablish the positions of toolroom attendant and maintenance electrician which it abolished as part of an unlawful scheme to discharge Connie Lane and Jesus A. Canales, if such discriminatees accept the offers of reinstatement. As Edward Brown has been reinstated, and Gary S. Thornton's reinstatement circumstances are deemed to have been fully litigated, the Respondent need not reoffer reinstatement to either. The employees to whom the Respondent must offer reinstatement are:

Kenneth Appleton	Connie Lane
Jesus A. Canales	Roger Strahm
Timothy Jolly	Gene E. Wright Jr.

The Respondent shall make whole the foregoing employees, including Edward Brown and Gary S. Thornton, for any loss of earnings, plus interest, which they may have suffered. Backpay shall be computed in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

In accordance with *Sterling Sugars*, 261 NLRB 472 (1981), the Respondent shall expunge from its files any reference to the unlawful discharge of Timothy Jolly. It shall notify him in writing that such has been done and that evidence of the unlawful discharge will not be used as a basis for further personnel action against him.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>80</sup>

<sup>80</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

#### ORDER

The Respondent, Baker Manufacturing Company, Ingleside, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Surveilling its employees by unlawfully photographing those wearing union badges.

(b) Impliedly threatening employees with unspecified future reprisals if they do not cease supporting a union organizing movement.

(c) Discouraging membership in United Steelworkers of America, AFL-CIO, or International Union of Electrical, Radio and Machine Workers, AFL-CIO, or any other labor organization, by unlawfully discharging, terminating or laying off employees, or discriminating against them in any other manner with respect to their hire and tenure of employment in violation of Section 8(a)(3) of the Act.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist United Steelworkers of America, AFL-CIO or International Union of Electrical, Radio and Machine Workers, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, to act together for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

2. Take the following affirmative action which will effectuate the policies of the Act.

(a) Offer the below-named employees immediate and full reinstatement to their former jobs or, with the exceptions noted below, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed:

Kenneth Appleton	Connie Lane
Jesus A. Canales	Roger Strahm
Timothy Jolly	Gene E. Wright Jr.

(b) Reestablish the position of toolroom attendant and maintenance electrician if Connie Lane and Jesus A. Canales, respectively, accept the offers of reinstatement to their old jobs.

(c) Make Edward Brown, Gary S. Thornton, and the other six employees named above in paragraph 2(a) whole for any loss of earnings that they may have suffered by reason of the Respondent's unlawfully discriminating against them in accordance with the recommendations set forth above in the section of this decision entitled "The Remedy." Reimburse, with interest, Jesus A. Canales for any educational expenses he has incurred in taking electrical-related courses to the extent, as is determined in the compliance stage, that the Respondent would have paid for such expenses.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of the Order.

(e) Post at its Ingleside, Texas facility copies of the attached notice marked "Appendix."<sup>81</sup> Copies of the notice, on forms provided by the Regional Director for Region 23, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Rea-

---

<sup>81</sup> If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

sonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Expunge from its files any reference to the discharge of Timothy Jolly, and notify him in writing that this has been done and that evidence of the unlawful discharge will not be used as a basis for future personnel action against him.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that complaint paragraphs 7 and 9(a), (b), and (c) be dismissed.